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NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION AUTHORIZATION ACT OF 1987

APRIL 15, 1987.—Ordered to be printed

Filed under the authority of the order of the Senate of April 10 (legislative day, March 30), 1987

Mr. HOLLINGS, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

[To accompany S. 853]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 853) to amend the National Traffic and Motor Vehicle Safety Act of 1966 and the Motor Vehicle Information and Cost Savings Act to authorize appropriations for fiscal years 1988 and 1989, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill do pass.

PURPOSE OF THE BILL

The National Highway Traffic Safety Administration (NHTSA) of the Department of Transportation (DOT) is responsible for motor vehicle safety on our Nation's highways. While advances have been made in recent years in the field of highway safety, the death and injury toll from highway accidents continues to be substantial.

This legislation amends the National Traffic and Motor Vehicle Safety Act of 1966 (Safety Act) and the Motor Vehicle Information and Cost Savings Act (Cost Savings Act) to authorize appropriations for fiscal years 1988 and 1989 for the purpose of carrying out various NHTSA programs. The legislation would also direct NHTSA to take steps to upgrade and expand the current side impact crash protection standard, to apply certain automotive safety standards to multipurpose passenger vehicles, including

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light trucks, in accordance with certain statutory tests, and to require lap-shoulder belts on outboard rear seats.

BACKGROUND AND NEEDS

NHTSA administers three major statutes: the National Traffic and Motor Vehicle Safety Act of 1966; The Motor Vehicle Information and Cost Savings Act; and the Highway Safety Act of 1966. These statutes direct NHTSA to establish safety standards, mandate compliance, undertake safety research, order recalls, provide consumers with information on motor vehicles, and establish guidelines for the States' highway safety programs.

Preliminary data for 1986 suggests that about 45,634 persons died in traffic crashes, an increase of almost 2,000 from the 1985 level. This increase may be partially due to an increase in travel in 1986. Despite this, the increase in fatalities is a reminder of the urgent need to continue safety efforts and to make safety improvements.

Although many of NHTSA's programs actively promote highway safety, NHTSA continues to be a target of criticism that it is not effectively carrying out its mandate to save lives, reduce injuries, and reduce consumer costs of accidents. S. 853 was introduced to facilitate the goals of increased safety and reduced costs for the Nation's consumers.

Among NHTSA activities in recent years which have been addressed by S. 853 are the following.

SIDE IMPACT PROTECTION

The Federal Motor Vehicle Safety Standard governing side impact protection, standard 214, became effective in January 1973, although a number of domestic vehicles complied with the standard earlier.

The current side impact protection standard requires that a vehicle must be able to withstand a force equal to twice its weight, up to a maximum of 7,000 pounds. This means that a light vehicle, such as a subcompact, would have to withstand a much smaller force than would a full-size car. Thus, as cars get lighter and require more side impact protection, the protection becomes poorer.

Based on the need for improved side impact protection and the demonstrated technology to accomplish such an improvement, the Center for Auto Safety petitioned NHTSA to upgrade Standard 214 in 1977. In 1979, NHTSA issued a comprehensive evaluation of Standard 214 and an Advance Notice of Proposed Rulemaking to upgrade the standard. The new standard would have required a 30 mile per hour dynamic side crash test with instrumented dummies meeting specified injury criteria, thus making the test more closely resemble real-world crashes. The new standard would also have been extended to apply to multipurpose passenger vehicles.

In July 1982, NHTSA terminated this rulemaking, noting that many complex issues had arisen which would require considerable time to resolve. NHTSA said the rulemaking would be reopened "after research and analysis has progressed to the point that appropriate test methods and performance parameters can be developed." This process was expected to take one year.

In March 1982, NHTSA embarked on a "coordinated automotive research" effort. This program was oriented toward the establishment of test procedures which could be used to assess side impact crash safety. The program was subsequently expanded to include other research projects. The propriety of this type of cooperative effort was challenged in court by the consumer group Public Citizen. In July 1983, the parties settled the case and NHTSA discontinued its cooperative research program on side impact protection.

NHTSA continues to conduct research in this area. It has continually promised to reopen its rulemaking on the issue, but has yet to do so.

PASSIVE RESTRAINTS

In 1967, DOT issued the original occupant protection standard, Federal Motor Vehicle Safety Standard 208, which required front and back seat belt protection in all cars. In 1972, this standard was revised to include "complete passive protection" on vehicles manufactured after August 15, 1975. After years of regulatory, Congressional, and court action on the passive restraints issue, NHTSA issued its current passive restraint regulation in July 1984. This standard provides for the following:

1. Cars manufactured for sale in the United States must be equipped with passive seat belts, air bags, or energy absorbing interiors, using the following phase-in schedule: 10 percent of the cars manufactured after September 1, 1986; 25 percent of the cars after September 1, 1987; 40 percent of the cars after September 1, 1988; and all cars after September 1, 1989.
2. To encourage the use of air bags or other new technologies, manufacturers are allowed to count a car towards the compliance percentage during the phase-in period if the vehicle is equipped with an air bag or other automatic non-belt system at the driver's seat and a manual lap-shoulder belt at the front passenger seat. (On March 25, 1987, DOT announced a rule in response to a recent petition by the Ford Motor Company which extends this option to September 1, 1993, provided the automatic protection on the driver side is an air bag or other non-belt technology.)
3. The above passive restraint requirements will be rescinded if States representing at least two-thirds of the United States population have enacted mandatory seat belt use laws by April 1, 1989. (Currently, there are mandatory seat belt use laws in twenty-five States and the District of Columbia. A September 1986 United States Court of Appeals decision, however, stated that none of the twenty State laws then on the books apparently complied with the Secretary's specific requirements for mandatory seat belt use laws and that it thus appeared unlikely that the passive restraint standard would be rescinded by 1989. *State Farm Mutual Automobile Insurance Co.* v. *Dole,* 803 F.2d 474, 480–81 (D.C. Cir. 1986), *cert. denied,* —— U.S. —— (1987).)

The three largest domestic auto manufacturers have announced plans to equip large volumes of vehicles with air bags. For the model year 1990, Ford Motor Company plans to produce 500,000 to one million cars equipped with driver side air bags. Chrysler Corporation plans 50–70,000 driver side air bags for its 1988 models, 200–250,000 for its 1989 models, and 600–900,000 for its 1990 models. General Motors Corporation plans to make approximately three million driver side air bags available for its 1992 models.

REAR SEAT BELTS

In 1968, NHTSA promulgated Federal Motor Vehicle Safety Standard 210, requiring that all passenger cars include locations for anchors or brackets to anchor lap-shoulder or three-point belts at the outboard rear seat position. On August 8, 1986, the National Transportation Safety Board (NTSB) issued a report which stated that in some instances persons using rear lap belts may be inadequately protected and may sustain severe abdominal injuries from the belt itself during a crash. NHTSA has continually promised to examine the issue of the need for three-point belts, but has yet to announce any rulemaking.

MULTIPURPOSE PASSENGER VEHICLES

Light trucks, minivans, and four-wheel-drive vehicles, referred to collectively as multipurpose passenger vehicles (MPVs), have enjoyed increasing popularity over the past decade. Since 1971, for example, the light truck market share of light duty vehicles virtually doubled, as annual light truck sales approached 4 million. Projected sales for these vehicles in 1987 range as high as one-third of the new car market.

Despite the broad mandate of the Safety Act requiring NHTSA to develop safety standards for all motor vehicles, many MPVs may lack important safety features which have long been required for passenger cars. This situation exists because the design and use patterns of MPV's were less like passenger cars in the 1960's when many of those safety standards were established. The popularity of these vehicles has been attributed, in part, to their use as passenger vehicles. Indeed, the minivan has replaced the station wagon for many individuals. The pickup is often used in the city and the suburbs rather than exclusively on the farm.

It is believed that the discrepancy between passenger cars and MPVs has contributed significantly to the annual toll of 7,000 multipurpose vehicle fatalities. Although passenger car occupant deaths decreased by over 10 percent from 1975 to 1983, MPV deaths increased at an alarming rate of over 30 percent during the same period. The annual death rate associated with small utility vehicles, for example, is nearly five times the rate of large cars. Small trucks have a death rate nearly twice as high as that of large passenger cars.

The application of these safety standards to MPV's is not a new issue. Indeed, in 1972, the National Transportation Safety Board reported that the severity of injuries appeared considerably greater for occupants of certain MPVs than for occupants of passenger cars involved in accidents. The Board suggest that this may be due, in part, to the MPV exemption from certain standards. Similarly, a 1978 United States General Accounting Office (GAO) study recommended that NHTSA reassess its vehicle classification system for these very reasons and concluded that delays by NHTSA in producing the assessment were unwarranted. The GAO study further recommended that NHTSA apply a number of passenger car safety standards to MPVs.

Following the GAO study, NHTSA planned to extend a number of passenger car safety standards to MPVs, but to date has failed to do so. In the fiscal year 1987 Transportation Appropriations legislation, NHTSA was required to report on MPV safety to the Congress by April 15, 1987. Although NHTSA has indicated it is considering opening rulemakings on a number of these safety standards, this Congressionally required study is the only visible effort in this area.

AUTOMOBILE CRASHWORTHINESS DATA

Title II of the Cost Savings Act requires the Secretary of Transportation to compile information regarding:

1. The damage susceptibility of passenger automobiles;
2. The degree of crashworthiness;
3. The characteristics of such vehicles with respect to ease of diagnosis and repair of mechanical and electrical systems; and
4. Vehicle operating costs dependent upon the above.

The Secretary is required to furnish this information to the public in a "simple and readily understandable form in order to facilitate comparison among the various makes and models of passenger motor vehicles," 15 U.S.C. 1941.

A Notice of Proposed Rulemaking issued in January 1981 would have required manufacturers to print crashworthiness ratings on the windshield of new cars. The proposed program would have provided consumers with information on the safety performance of new cars in the dealer showroom and would have encouraged manufacturers to compete on the basis of vehicle crash safety. No rule was issued. NHTSA currently conducts a new care assessment program intended to help consumers compare crashworthiness and safety performance of similarly-sized vehicles. This information is derived through 35 mile per hour fixed-barriers crash testing of approximately 30 new motor vehicles each year. The information is not routinely provided to purchasers in auto dealerships, however.

AUTOMOBILE BUMPERS

In 1971, NHTSA promulgated the part 215 bumper safety standard, pursuant to the Safety Act. This standard, which went into effect in September 1973, required that bumpers be able to withstand collisions at up to 5 miles per hour in the front and 2.5 miles per hour in the rear, without permitting damage to safety-related equipment (that is, headlamps and taillights; door, trunk and hook latches; and the cooling and fuel exhaust systems.) The standard was upgraded one year later to include 5 miles per hour impact speeds for both front and rear bumpers and 3 miles per hour at the corners. It included impact testing with a pendulum-type device, in addition to the barrier impact already required, thus making the test more stringent.

In October 1972, Congress enacted the Cost Savings Act, with the stated purpose of reducing the economic losses caused by traffic accidents. NHTSA was directed to promulgate bumper standards that would increase damage protection levels over those existing at the time the act was passed. To accomplish this, NHTSA promulgated the part 581 standard in 1976. This standard incorporated the part 215 safety standard and, starting with 1979 model car, required bumpers to be capable of withstanding 5 mile per hour collisions.

In 1982, NHTSA rolled back the 5 mile per hour bumper standard. NHTSA's decision to roll back the bumper standard was challenged in the courts by State Farm Mutual and Allstate Insurance Companies. In January 1985, the United States Court of Appeals upheld NHTSA's decision, noting that NHTSA had made a 'reasonable' decision, given the evidence available to the agency at that time. When it lowered the standard, NHTSA promised to develop a bumper rating system for consumers. After five years, NHTSA has yet to develop such a system.

NATIONAL TRAFFIC AND MOTOR VEHICLE SAFETY ACT OF 1966

The Safety Act was enacted by Congress to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents. Congress determined that it is necessary to establish safety standards for motor vehicles and equipment and to undertake and support necessary safety research and development.

Section 103 of this act (15 U.S.C. 1932(f), would require the Secretary of Transportation (through NHTSA) to take the following action in prescribing standards:

1. Consider relevent available motor vehicle safety data, including the results of research, development, testing, and evaluation activities conducted pursuant to this act;
2. As appropriate, consult with State or interstate agencies (including legislative committees);
3. Consider whether a proposed standard is reasonable, practicable and appropriate for the particular type of motor vehicle or item of motor vehicle equipment and for which it is prescribed; and
4. Consider the extent to which such standards will contribute to carrying out the purposes of the act.

MOTOR VEHICLE INFORMATION AND COST SAVINGS ACT

The Cost Savings Act was enacted in 1972 and represented a significant effort by Congress to provide consumers with meaningful information to make informed purchasing decisions, to avoid unnecessary damage to their car, and to foster easy diagnosis and repair of passenger vehicles.

The act contains the following six titles:

TITLE I—BUMPER STANDARDS

Title I has the purpose of reducing the extent of economic loss resulting from damage to passenger motor vehicles involved in motor vehicle accidents by providing for the promulgation and enforcement of bumper standards. Congress directed that bumper standards "seek to obtain the maximum feasible reduction of costs to the public and to the consumer," taking into account costs and benefits of the standard as well as health and safety considerations. 15 U.S.C. 1911-22.

TITLE II—AUTOMOBILE CONSUMER INFORMATION STUDY

Title II would require NHTSA to compile information relating to the damage susceptibility of passenger motor vehicles, and the crashworthiness of such vehicles with respect to the ease of diagnosis and repair of mechanical and electrical systems which fail during use or which are damaged in motor vehicle accidents. NHTSA is required to furnish this information to the public "in a simple and readily understandable form in order to facilitate comparison among the various makes and models of passenger motor vehicles. * * *" 15 U.S.C. 1941-49.

TITLE III—DIAGNOSTIC INSPECTION DEMONSTRATION PROJECTS

Title III would require NHTSA to establish motor vehicle diagnostic inspection demonstration projects. 15 U.S.C. 1961-64. These projects have been concluded and data has been analyzed.

TITLE IV—ODOMETER REQUIREMENTS

Title IV notes the importance of an accurate indication of the mileage traveled by a motor vehicle, as it assists the purchaser in determining the safety and reliability of a vehicle. The purpose of this title is therefore to prohibit tampering with odometers on motor vehicles and to establish certain safeguards for the protection of purchasers with respect to the sale of motor vehicles having altered or reset odometers. 15 U.S.C. 1981-91.

TITLE V—IMPROVING AUTOMOTIVE EFFICIENCY

Title V sets fuel economy standards for model years 1978-80 and for model year 1985 and thereafter, and directs the Secretary of Transportation to establish standards for model years 1981-84. 15 U.S.C. 2001-12. NHTSA does not believe any authorization is needed for this program.

TITLE VI—THEFT PREVENTION

Title VI, added by Public Law 98-547, would require the Secretary to promulgate, a motor vehicle theft prevention standard. This standard is intended to prevent and discourage motor vehicle theft, and the sale and distribution of used parts removed from stolen vehicles, and to help reduce the cost of premiums charged consumers for motor vehicle theft insurance. 15 U.S.C. 2021-34. NHTSA does not believe any specific authorization is needed for this program.

LEGISLATIVE HISTORY

In the 99th Congress, the Committee held hearings on NHTSA on February 21, 1985 and December 11, 1986. On April 18, 1985, the Committee without objection ordered reported NHTSA authorization legislation, S. 863. S. 863 passed the Senate but the House and Senate did not agree on the legislation before the end of the 99th Congress.

On February 3, 1987, Senator Danforth offered a NHTSA amendment to H.R. 2, the Surface Transportation and Uniform Relocation Assistance Act of 1987. On February 3, 1987, the Senate adopted a second-degree substitute amendment to the Danforth amendment offered by Senators Hollings and Gore which imposed an April 1, 1987 deadline on the completion of the Commerce Committee consideration of NHTSA reauthorization legislation. On February 5, 1987, Senate Danforth introduced S. 516, related legislation, which was referred to the Committee.

On March 6, 1987, the Committee conducted an authorization hearing on NHTSA. On March 24, 1987, the Committee without objection ordered NHTSA reauthorization legislation to be reported S. 853 was introduced by Senator Gore on behalf of all of the Members of the Committee on March 26, 1987.

Summary of Major Provisions

SECTION 201—SIDE IMPACT PROTECTION

This section would require NHTSA to begin a rulemaking to upgrade the existing side impact crash protection standard (Federal Motor Vehicle Safety Standard 214) within 60 days after the date of enactment. This section directs DOT to establish performance criteria for side impact occupant protection and to issue final regulations implementing the standard within one year of enactment. This section also requires NHTSA to issue an advanced notice of proposed rulemaking to extend the applicability of the standard to multipurpose passenger vehicles.

SECTION 202—CRASHWORTHINESS DATA

This section would require the National Academy of Sciences to study the means of establishing a method for calculating a uniform numerical rating to enable consumers to compare the crashworthiness of automobiles. The Secretary of Transportation shall determine whether to promulgate a rule based on the Academy's recommendation and public comments.

SECTION 301—STANDARDS COMPLIANCE

This section would require the Secretary of Transportation to establish a schedule for use in ensuring compliance with each of NHTSA's safety standards.

This section would further require that the Secretary of Transportation review the methods for the collection of accident data relevant to automobile safety standards. Based upon an assessment of the desirability of collecting additional data, this section directs the Secretary of Transportation to collect such additional data and to utilize it in determining which motor vehicles should be tested and whether they comply with safety standards.

SECTION 302—INVESTIGATION AND PENALTY PROCEDURES

This section would require the Secretary of Transportation to establish guidelines and procedures governing noncompliance inspections and investigations. This section would also require the Secretary of Transportation to establish criteria and procedures for use in determining when the results of such an investigation should warrant imposition of a civil penalty.

SECTION 303—TRAFFIC SAFETY FOR HANDICAPPED INDIVIDUALS

This section provides for a uniform system for handicapped parking designed to enhance the safety of handicapped individuals and others by adding a new guideline for the States. The provision would require that the new uniform system adopt the International Symbol of Access as the only recognized symbol for identification of vehicles used for transporting handicapped individuals whose walking ability is impaired.

SECTION 304—MULTIPURPOSE PASSENGER VEHICLE SAFETY

This section would require NHTSA to initiate within 60 days and complete within one year after enactment rulemaking proceedings to revise, where appropriate, the following automotive safety standards for application to multipurpose passenger vehicles: minimum roof crush resistance, head restraints, high center-mounted stoplamps, and passive restraints. In addition, this section would require NHTSA to initiate a rulemaking, subject to the same time constraints, to review its system of classification of vehicles under 10,000 pounds.

SECTION 305—REAR SEAT BELTS

This section would require NHTSA to commence within 60 days and complete within one year of enactment a rulemaking to require lap-shoulder belts on outboard rear seats. This section would require NHTSA to apply the standard to one-half of all passenger automobiles manufactured by each manufacturer after September 1, 1989, and to all passenger automobiles manufactured after September 1, 1990.

SECTION 306—CERTIFICATION OF BUMPERS

This section would require manufacturers to disclose the impact speed at which each bumper meets applicable damage criteria and print the rating on the window sticker of each new car. The Secretary of Transportation may require that automobile dealers distribute to prospective purchasers bumper information compiled by DOT.

SECTION 307—STATE MOTOR VEHICLE SAFETY INSPECTION

This section provides for an 18-month study of State motor vehicle inspection programs by the National Academy of Sciences.

SECTION 308—RECALL OF CERTAIN MOTOR VEHICLES

This section would authorize the Secretary of Transportation to require manufacturers to send follow-up notifications to vehicle and equipment owners to enhance safety defect and non-compliance recall response rates. This section would also require lessors of defective motor vehicles to forward recall notices to lessees. It would require a motor vehicle dealer to remedy any new motor vehicle or item of motor vehicle equipment in the dealer's possession for which the dealer has received a recall notice before selling or leasing the vehicle or item of vehicle equipment.

SECTION 309—STUDY OF DARKENED WINDOWS

This section would require NHTSA to study the use of darkened windshields and window glass in passenger vehicles. The focus of the study would be the effects of such use on the safe operation of passenger vehicles, as well as the hazards to the safety of law enforcement personnel.

SECTION 310—ODOMETER MODIFICATION

This section would require that no registration card may be issued in any State for any motor vehicle unless the application for the registration card contains information on odometer readings.

ESTIMATED COSTS

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, April 2, 1987.

Hon. ERNEST F. HOLLINGS,
Chairman, Committee on Commerce, Science and Transportation,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the attached cost estimate for the National Highway Traffic Safety Administration Authorization Act of 1987, as ordered reported by the Senate Committee on Commerce, Science and Transportation, March 24, 1987.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,
Sincerely,

EDWARD M. GRAMLICH,
Acting Director.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: Not yet assigned.

2. Bill title: The National Highway Traffic Safety Administration Authorization Act of 1987.

3. Bill status: As ordered reported by the Senate Committee on Commerce, Science and Transportation, March 24, 1987.

4. Bill purpose: This bill would authorize appropriations of $57.0 million in fiscal year 1988 and $58.5 million in fiscal year 1989 for various operations and research activities of the National Highway Traffic Safety Administration (NHTSA). In addition, this bill would allow the Secretary of Transportation to use up to $10 million for a program to encourage the use of safety belts and passive restraints. These funds would be derived from unobligated balances of funds provided for highway safety programs under Title 23, United States Code. The bill does not specify from which program or programs these balances should be drawn.

A number of provisions in this bill would mandate regulatory actions and studies. The bill would direct the Secretary of Transportation to develop regulations and procedures relating to side impact protection, handicapped parking, multipurpose passenger vehicle safety, rear seatbelts, and bumper capability labeling. The Secretary would also be required to contract with the National Academy of Sciences for a study of possible means of comparing the crashworthiness of different automobile models, and, if this study shows it to be feasible, establish a system of crashworthiness ratings. The bill would also mandate a study by the National Academy of Sciences of the effectiveness of state motor vehicle safety inspection programs.

For fiscal year 1987, $89.2 million has been appropriated for NHTSA operations and research, including $34.2 million from the Highway Trust Fund and $55.1 million from the general fund. This appropriation also covers programs authorized by Section 403 of Title 23 of the United States Code, which are not included in this bill. The Surface Transportation and Relocation Assistance Act of 1987 (H.R. 2), which has been passed by both houses of the Congress, would authorize approprations of $33 million annually for this program for fiscal year 1987 through 1991.

5. Estimated cost to the Federal Government:

	1987	1988	1989	1990	1991
Authorization Level	57.0	58.5			
Estimated Outlays	37.0	52.3	20.3	5.9	

Basis of estimate: It is assumed that the full amounts authorized will be appropriated. The outlay estimate is based on the historical spending rates for the various activities.

Based on information provided by NHTSA, CBO expects that the studies required by this bill could cost about $1 million. They are assumed to be covered by the overall funding authorizations in the bill.

6. Financing mechanism: This legislation authorizes funding to be provided in subsequent appropriation bills. This cost estimate shows the amount of budget authority that is authorized to be appropriated. The estimated outlays are those that would be generated if the Congress chooses to fully fund the authorized amounts.

7. Estimated cost to State and local governments: This bill would require the Secretary of Transportation to establish uniform guidelines for handicapped parking. These guidelines would provide that fees charged for licensing and registering vehicles used by handicapped individuals should not exceed those charged for comparable vehicles.

The bill would also prohibit states from issuing automobile registration cards unless applications include information on odometer mileage. This would necessitate new procedures for states and would result in additional costs. States would incur costs, both for personnel and contractors, to process applications, particularly those that do not include complete odometer information. In addition, states would be required to maintain this information for five years, resulting in additional data storage costs.

Due to the limited time available, CBO was able to obtain information on potential costs from only a small number of states. Based on this information, CBO estimates that the total cost of this provision to all states would be about $15 million to $20 million annually. Currently, only Oregon ties odometer readings to vehicle registrations.

8. Estimate comparison: None.
9. Previous CBO estimate: None.
10. Estimate prepared by: Marjorie Miller.
11. Estimate approved by: James L. Blum, Assistant Director for Budget Analysis.

REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of Rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of this legislation:

NUMBER OF PERSONS COVERED

Title I of S. 853, as reported, continues existing programs under the Safety Act and the Cost Savings Act. Thus, the number of persons covered should be consistent with current levels.

Title II of S. 853 would require NHTSA to modify and upgrade the existing Federal Motor Vehicle Safety Standard concerning side impact crash protection. Title II also provides for an 18-month National Academy of Sciences study of whether an automobile crashworthiness rating system can be developed; at the conclusion of the study, NHTSA will be required to determine whether a crashworthiness rule should be adopted. The vehicles covered by the requirements of title II currently are subject to a number of Federal Motor Vehicle Safety Standards. Therefore, the number of persons covered should be consistent with current levels.

Title III includes a number of provisions. Sections 301 and 302 direct NHTSA to establish guidelines and procedures to ensure safety standards compliance and the imposition of civil penalties. Section 308 enhances NHTSA's recall authority. Section 303 provides for a uniform handicapped parking system, and section 304 would require NHTSA to examine whether certain passenger car safety standards should be extended to multipurpose passenger vehicles. Sections 305 and 306, respectively, direct NHTSA to require rear seat lap-shoulder belts and establish an automobile bumper crash rating system. Sections 307 and 309 would require studies of the effectiveness of State motor vehicle inspection in reducing highway crashes, and the safety and law enforcement implications of darkened windshields and windows. Finally, section 310 expands existing requirements to prevent odometer tampering. To the extent that the provisions of title III affect NHTSA safety standards and procedures, the number of persons covered should remain consistent with current levels, since the vehicles covered currently are subject to a number of Federal Motor Vehicle Safety Standards. Section 303 may affect those handicapped individuals operating motor vehicles in States which do not have handicapped parking systems consistent with the uniform system provided for in this bill, and section 310 will affect those individuals registering motor vehicles in States where enhanced odometer reporting requirements are not in effect.

ECONOMIC IMPACT

Section 101(a) of S. 853 authorizes funding of $53,733,000 in fiscal year 1988 and $55,233,000 in fiscal year 1989 for NHTSA programs carried out pursuant to the Safety Act. The modest increase in funding between fiscal years 1988 and 1989 is designed to compensate for general projected increase in the cost of living. This funding will be used to conduct automotive safety research, provide consumer information, conduct defect and noncompliance testing, promulgate safety standards, and enforce provisions of the Safety Act. These activities are not expected to have an inflationary impact on the Nation's economy.

Subsection (b) of section 101 authorizes $363,000 for each of fiscal years 1988 and 1989 to enable NHTSA to carry out its responsibilities regarding the establishment and evaluation of automobile bumper standards. Subsection (c) authorizes appropriations of $2,301,000 for each of fiscal years 1988 and 1989 under the Cost Savings Act. This funding will be used to compile and provide to consumers information on the safety of various motor vehicles. Finally, subsection (d) authorizes appropriations of $560,000 for each of fiscal years 1988 and 1989, to enable NHTSA to carry out its responsibilities concerning the establishment of odometer tampering safeguards. The activities are not expected to have an inflationary impact on the Nation's economy. Because of the possible consumer savings from each of these programs, it is conceivable that these efforts could have a deflationary impact on the national economy.

Section 102 authorizes DOT to reprogram $10 million from previously appropriated but unobligated funds to carry out a national program to encourage the use of seat belts and passive restraints in automobiles. As the funds used for this program already have been appropriated, this reprogramming authority should not have an inflationary impact on the Nation's economy.

Titles II and III include provisions requiring NHTSA to upgrade or establish certain safety standards. Costs incurred by manufacturers to comply with these changes may be passed on to consumers. The Committee expects, however, that because of the high volume of vehicles involved, any increases in purchase prices will be minimal. Any such price increases will be offset by consumer savings for such items as repairs, insurance, and health care costs. The government also will receive a net savings from safer automobiles.

PRIVACY

S. 853 will have no adverse impact on the personal privacy of the individuals affected.

PAPERWORK

S. 853, as reported, does not impose additional reporting requirements on NHTSA or others, beyond the public information dissemination requirements already imposed on NHTSA pursuant to the Cost Savings Act and existing State automobile registration procedures. Thus, the legislation should not result in a signficant paperwork increase to NHTSA, automobile manufacturers or others.

SECTION-BY-SECTION ANALYSIS

Section 1—Short Title

The first section states the short title of the legislation, the "National Highway Traffic Safety Administration Authorization Act of 1987".

Section 2—Definitions

This section defines certain terms used throughout S. 853. "Multipurpose passenger vehicle" is defined as a motor vehicle with motive power, other than a trailer, with a gross vehicle weight under 10,000 pounds and which is designed to carry 10 persons or less and constructed either on a truck chassie or with special features for occasional off-road operation. This definition does not include motorcycles.

"Passenger automobile" is defined as a motor vehicle with motive power, excluding multipurpose passenger vehicles, motorcycles, buses, trucks, or trailers designed for carrying 10 persons or less.

"Secretary" is defined as the Secretary of Transportation.

TITLE I—AUTHORIZATION OF APPROPRIATIONS

Section 101—General Authorization

Subsection (a) amends section 121 of the Safety Act to authorize appropriations of $53,733,000 for fiscal year 1988 and $55,233,000 for fiscal year 1989 for the highway safety programs of NHTSA.

Subsection (b) amends section 111 of the Cost Savings Act to authorize appropriations of $363,000 for each of fiscal years 1988 and 1989 to enable NHTSA to carry out its responsibilities regarding establishment and evaluation of automobile bumper standards.

Subsection (c) amends section 209 of the Cost Savings Act to authorize appropriations of $2,301,000 for each of fiscal years 1988 and 1989 to carry out NHTSA's programs to compile and provide information to the public on the safety of various makes and models of passenger motor vehicles.

Subsection (d) amends section 417 of the Cost Savings Act to authorize appropriations of $560,000 for each of fiscal years 1988 and 1989 to enable NHTSA to carry out its responsibilities in preventing odometer fraud.

Section 102—Occupant Crash Protection Program

This section authorizes the Secretary of Transportation to reprogram up to $10 million of previously appropriated but currently unobligated balances of funds made available for highway safety program under title 23 of the United States Code. These reprogrammed funds will be used to carry out a national program to encourage the use of seat belts and passive restraints. This section provides, however, that three fourths of these reprogrammed funds are to be used for air bag education. Of the funds allocated for air bag education, not less than $5 milllion is to be used for an air bag demonstration program.

The Secretry could use the reprogrammed money to supplement the public knowledge about the effectiveness of air bags. Existing knowledge comes from two retrofit air bag programs and monitoring of fleet experience with air bags.

NHTSA has funded two air bag programs. In March 1984, NHTSA entered into a contract with the Breed Corporation to demonstrate an all-mechanical air bag retrofit system. The Breed contract has now ended, and NHTSA is conducting evaluation testing under a separate contract and under an interagency agreement with the Navy.

The second air bag program is being undertaken by Romeo Kojyo Co., Inc., under a contract with NHTSA. This company has installed a total of 539 of its retrofit driver air bag systems in State police vehicles. As of January 1987 there have been 34 crashes in which the air bag deployed. There were no significant injuries in any of these deployments.

In addition to these contracts, NHTSA is monitoring the experience of the General Services Administration with a fleet of 5,000 Ford Tempos equipped with driver-side air bags. As of January 1987, there had been 64 crashes in which the air bags deployed. In none of these crashes did the driver sustain significant injuries. One fatality occurred in an air bag-equipped Tempo which hit a heavy truck at a closing speed of 95 mph. In that case, the vehicle's electrical system was destroyed before the air bag could deploy and the driver could not have been protected by the air bag.

TITLE II—SIDE IMPACT PROTECTION AND CRASHWORTHINESS DATA

Section 201—Side Impact Protection

This section would require NHTSA to begin a rulemaking to upgrade the existing side impact crash protection standards (Federal Motor Vehicle Safety Standard 214) within 60 days after the date of enactment. A previous side impact rulemaking was teminated by NHTSA on July 12, 1982. This section directs DOT to establish performance criteria for side impact occupant protection and to issue final regulations implementing the standard within one year of enactment. The Committee expects that this improved standard would employ a dynamic crash test procedure which might include either component or whole vehicle tests. This section would also require NHTSA to issue an advanced notice of proposed rulemaking to extend the applicability of the standard to multipurpose passenger vehicles.

Almost 8,000 Americans die each year in side impact crashes and approximately 23,000 suffer serious, nonfatal injuries. Thirty-five percent of the life-threatening automobile injuries occur in side crashes. The current side impact standard is effective in preventing death and serious injury in single-vehicle crashes where about 30 percent of the life-threatening injuries in side impacts occur, but it is not effective in the 70 percent of side impacts involving vehicle-to-vehicle crashes.

Research in the 1970's demonstrated that side impact crashworthiness of cars could be significantly improved with known technology. DOT's Resarch Safety Vehicle (RSV) program clearly showed that survivable side impact velocities could be increased from about 12 miles per hour to over 30 miles per hour for subcompact vehicles. For example, Calspan's RSV work found that the addition of reinforcements, increased sheet metal gauge, and the substitution of high-strength low alloy steel for mild steel in a 2,600 pound car would provide occupant protection in 40 to 45 mile per hour side impacts. Both Minicars Corporation and Calspan found that filling side panels and doors with foam would reduce side impact intrusion to less than six inches in 30 mile per hour or greater side impacts.

Section 202—Automobile Crashworthiness Data

This section directs NHTSA to arrange for a National Academy of Sciences study to determine an appropriate method for calculating a uniform numerical rating which will inform consumers of the relative crashworthiness of different passenger automobiles. This section would require the Academy to conclude its study within 18 months after the date of enactment and report to NHTSA and to Congress on the results of its study together with recommendations.

This section instructs the Academy that its study shall include "examination of current and proposed crashworthiness tests * * * and shall be directed to determining whether additional objective, accurate and relevant information regarding the comparative crashworthiness of different passenger automobile models reasonably can be provided to consumers by means of such a crashworthiness rating rule." In using the word "additional," the Committee is recognizing that NHTSA and others are currently conducting crashworthiness tests. The Committee is not commenting concerning the objectivity, accuracy or relevancy of these tests.

On the basis of the Academy's study and public comment, NHTSA will be required to determine whether an objectively based system can be established for use by consumers to compare automobile crashworthiness. NHTSA would be required to publish the basis for its determination and submit the determination to Congress. This section precludes NHTSA from promulgating a rule without first affording the Senate and House Commerce Committees 60 days to review summaries of public comments the agency receives during the designated comment period. NHTSA may promulgate a rule before the 60-day period expires if its receives notice that each Committee has no objection to the promulgation of such a rule.

Subject to these prerequisites, if NHTSA determines that the establishment of such a system can be achieved, it will be required to promulgate a rule within three years of the date of enactment. If a crashworthiness rule is promulgated, NHTSA will be further required to establish procedures requiring automobile dealers to make available crashworthiness data for use by prospective automobile purchasers.

The Cost Savings Act currently requires DOT to compile crashworthiness information. In addition, NHTSA studies indicate that prospective new care purchasers favor the idea of government safety ratings. The Committee hopes that a new system could be developed so that ratings could be placed on the window stickers of vehicles. Purchasers would be able to compare crashworthiness ratings just as they currently compare mileage ratings.

TITLE III—MISCELLANEOUS PROVISIONS

Section 301—Standards Compliance

This section would amend section 103 of the Safety Act by adding new subsection (j)(1) and (2) to require the Secretary of Transportation to establish a schedule to govern NHTSA's enforcement and review of its safety standards. This provision is consistent with a United States General Accounting Office recommendation based on findings that a number of NHTSA's 39 testable safety standards have gone untested for long periods of time. The schedule to be established pursuant to this new provision is intended for use in ensuring compliance with safety standards and in ensuring that each safety standard is the subject of regular testing and evaluation.

This section would further require that the Secretary of Transportation review the methods for the collection of accident data relevant to Federal Motor Vehicle Safety Standards. This section would require the Secretary of Transportation to assess the desirability of collecting data in addition to the information currently collected, and estimate the costs and benefits involved in its collection. Based upon that assessment, this section directs the Secretary of Transportation to collect such additional data as is appropriate and to utilize it in determining which motor vehicles should be tested for compliance with safety standards.

Section 302—Investigation and Penalty Procedures

Subsection (a) of this section would amend section 112(a)(1) of the Safety Act to require the Secretary of Transportation to establish guidelines and procedures governing noncompliance inspections and investigations. This provision is consistent with changes to NHTSA's enforcement procedures recommended by the United States General Accounting Office which found that NHTSA currently lacks such enforcement guidelines and has not demonstrated a consistent basis for proceeding.

The new provision would require that such guidelines and procedures indicate timetables for such activity to ensure expeditious implementation. Subsection (b) of this section would amend section 109(a) of the Safety Act to require the Secretary of Transportation to establish criteria and procedures for use in determining when the results of such an investigation should warrant imposition of a civil penalty.

NHTSA's ability to proceed with investigations and the imposition of civil penalties in instances where NHTSA has not met the timetables it establishes pursuant to this section is protected. If in the future NHTSA is unable to meet such internal timetables, the Committee does not intend for such failure to be used as a defense by those seeking to avoid investigation or penalty.

Section 303—Traffic Safety for Handicapped Individuals

Subsection (a) of this section sets forth findings that a number of States currently fails to recognize the symbols of other States for the identification of motor vehicles transporting individuals with handicaps; and that the failure to recognize such symbols increases the likelihood that such individuals will be involved in traffic incidents resulting in injury or death.

Subsection (b) of this section amends section 402 of title 23 of the United States Code by adding a new guideline for the use of the States in implementing programs for handicapped parking. It would provide for a uniform system for handicapped parking designed to enhance the safety of handicapped as well as nonhandicapped individuals. The provision would require that the new uniform system adopt the International Symbol of Access as the only recognized symbol for identification of vehicles used for transporting handicapped individuals whose walking ability is impaired. It would further provide for the issuance of license plates and removable windshield placards displaying the International Symbol of Access. The new provision would provide that fees charged for registering and licensing vehicles used to transport handicapped individuals not exceed those charged for similar vehicles operated in the State, and that States recognize licenses and placards displaying the International Symbol of Access issued by other States.

Subsection (c) would direct the Secretary of Transportation, not later than two years after enactment, to evaluate State compliance with each of these requirements and report annually to Congress regarding such evaluation.

The Committee recognizes that there are 6.8 million disabled Americans who are in need of handicapped parking permits. In addition, some States do not provide total reciprocity in honoring other States' handicapped parking plates. Thus, as handicapped individuals go from one State to another, their disability may no longer be recognized when they attempt to use handicapped parking spaces. Such individuals are subject to costly fines. States which offer reciprocity are not always able to recognize other States' handicapped parking plates because the International Symbol of Access is not used universally.

The Committee also realizes that individuals in wheelchairs or other mobility impaired citizens are not always able to gain access to designated parking spaces in front of buildings. The safety of mobility impaired individuals trying to gain entrance to a building without access to handicapped parking is threatened because they may be forced to travel across parking lots or streets where they are at risk of being hit by automobiles if they are not seen, travel up steep inclines to gain entrance to buildings, or travel in adverse weather conditions such as rain or snow. The Committee expects NHTSA to consider this issue as part of its responsibility to review and take action to improve pedestrian safety.

In 1984, Congress adopted a provision in the Department of Transportation and Related Agencies Appropriations Act, 1984 (Public Law 98-78) asking the States to adopt a model uniform system for handicapped parking similar to the requirement of this section. The Committee received testimony that the results of this resolution have been mixed, however. Some States have adopted the Congressional model for handicapped parking, but other States have failed to do so.

Section 304—Multipurpose Passenger Vehicle Safety

This section would require NHTSA to initiate within 60 days and complete within one year after enactment rulemaking proceedings to revise, where appropriate under statutory standards, the following automotive safety standards for application to multipurpose passenger vehicles: minimum roof crush resistance, head restraints, high center-mounted stoplamps, and passive restraints. In addition, this section would require NHTSA to initiate rulemaking, subject to the same time constraints, to review its system of classification of vehicles under 10,000 pounds.

Under section 304, the Secretary of Transportation must revise the four passenger car standards to apply them to MPVs if the following existing statutory test is met: the standards must be practicable, meet the need for motor vehicle safety, and be stated in objective terms. However, with any particular standard or class of vehicles, if the Secretary determines that the test is not met, the rule should not be revised to include that particular standard or that particular class of vehicle. For example, applying the high center-mounted brake light standard to ambulances might not be practicable or meet the need for vehicle safety. Ambulances already have a number of other lights and warning devices which might reduce their likelihood of rear end collision.

The Committee believes that there are serious safety problems with MPVs. The problems are due in large part to the fact that these vehicles do not have to meet a number of important automotive safety standards.

First of all, NHTSA has applied a roof crush safety standard to passenger cars since 1971. Largely because of their higher center-of-gravity, many MPVs are more prone to roll-over than are passenger cars, with most fatalities occurring in single vehicle crashes. Yet NHTSA has not expanded the coverage of the existing standard for passenger cars to ensure roof crush resistance in MPVs.

Second, although passenger cars have been required to include head restraints since 1968, NHTSA has not extended this standard to MPVs either. These devices have prevented serious head and neck injuries for a number of years in passenger cars. This positive record suggests that similar action ought to be considered for MPVs, yet it has prompted no action. These devices could be particularly useful for small truck passengers whose heads are only inches from the rear window.

The third safety standard which does not currently apply to MPVs would require high center-mounted stoplamps. High center-mounted stoplamps provide improved brake warning, particularly for drivers who are one or more cars behind the stopping vehicle. In 1983, NHTSA amended its safety standards to require manufacturers to install these stoplamps in new passenger cars. This change will reduce by as much as one-half the 3 to 4 million rear-end collisions that result in over 2,300 deaths and a cost of more than $18 billion each year.

The fourth passenger car safety standard which this section would require NHTSA to address is the inclusion of passive restraints in MPVs. These protective devices include airbags and automatic seat belts. Since the occupants of certain categories of MPVs are twice as likely to be ejected from their vehicle during a crash as those in passenger cars, this is a particularly important safety standard to apply to MPVs.

Finally, as GAO recommended in 1978, NHTSA should review its system of classification of vehicles under 10,000 pounds. In the 1960's, NHTSA defined a number of vehicle classes, including a category referred to as light trucks (less than 10,000 pounds and designed for carrying cargo) and a category referred to as MPVs. Questions have been raised about the basis for these classifications. For example, NHTSA classified vehicles with four wheel drive or other off-the-road features as MPVs regardless of size or weight. Questions have also been raised about the consistency with which these classifications have been applied.

The 1978 recommendation found that delays in reassessing these classifications were unwarranted. The Insurance Institute for Highway Safety and the Center for Auto Safety have petitioned NHTSA to reevaluate the way in which it classifies vehicles. This provision would require this overdue review.

Section 305—Rear Seat Belts

This section would require NHTSA to commence within 60 days and complete within one year of enactment a rulemaking to require lap-shoulder (three-point) belts on outboard rear seats. This section would require that NHTSA apply the standard to one-half of all passenger automobiles manufactured by each manufacturer after September 1, 1989 and to all passenger automobiles manufactured after September 1, 1990.

Not less than 10 percent of agency fiscal year 1988 and 1989 funds under title II of the Cost Savings Act shall be utilized for consumer information dissemination purposes regarding retrofitting passenger automobiles with rear lap-shoulder belts.

On August 8, 1986, the NTSB, an independent Federal accident investigation agency, issued a report which stated that in some instance persons using rear lap belts may be inadequately protected against injury and may sustain servere abdominal injuries from the belt itself. NTSB Report, at 25, 33–38 (August 8, 1986). The choice between the use of lap belts or of no belts poses special problems for parents and others who transport children. With young children often traveling in the rear seat of automobiles, these drivers face the dilemma of whether to continue to use lap belts on children.

While the NTSB was unable to conclude that continued use of rear seat belts was a benefit to rear seat passengers, there is no disagreement among auto safety groups and major car manufacturers that three-point belts are safeter than lap belts. General Motors conducted studies in 1986 which showed that lap belts are only 7–18 percent effective in preventing fatalities compared to a 41 percent effective rate for lap-shoulder belts.

NHTSA Federal Motor Vehicle Safety Standard 210 requires that all car rear seats have locations for anchors or brackets to anchor lap-shoulder belts at the outboard seating positions. All rear automobile seats have been equipped with locations for anchors since 1968 and several manufacturers provide retrofit kits to install lap-shoulder belts in current or earlier models.

The Center for Auto Safety first petitioned DOT to require rear lap-shoulder belts in 1974 and has continued to press for the requirement. Since the NTSB report, NHTSA has promised on three separate occasions to commence a rulemaking on three-point rear seat belts. The first time was in an August 1986 letter to a concerned parents group. The second was at a December 11, 1986 Committee NHTSA oversight hearing. The third was at a March 6, 1987 Committee NHTSA hearing. Yet NHTSA has failed to take action. The Committee believes legislation is necessary to ensure that this problem is addressed expeditiously.

Several foreign manufacturers have been manufacturing cars with three-point belts for a number of years. Plans of two of the major domestic auto manfuacturers call for installing three-point seat belts in all of their cars by model year 1990. In light of the aggressive initiatives from these two car manufacturers and the strides of other auto companies, the Committee believes that one-half of each auto maker's newly manufactured vehicles should have three-point belts for the rear outboard seating positions in model year 1990 and in model year 1991 all newly manufactured vehicles should be brought into compliance.

SECTION 306—CERTIFICATION OF BUMPERS

This section adds a new section 102A to the Cost Savings Act. Subsection (a) would require the Secretary to promulgate a regulation establishing passenger motor vehicle bumper system labeling requirements. The regulation would apply to model years beginning 180 days after the date the regulation is promulgated.

Subsection (b) would require that the regulation provide that the manufacturer affix a label to each vehicle which is offered for sale disclosing an impact speed at which the manufacturer represents that the vehicle meets the applicable damage criteria.

Subsection (c) sets out the timetable for rulemaking and implementation for this section, requiring that rules be proposed within 90 days after the date of enactment, with a final rule promulgated not later than 150 days after such date.

Subsection (d) states that the Secretary may allow a manufacturer to comply with the labeling requirements by disclosing the bumper system impact speed on the price label or the fuel economy label already required by current law.

Subsection (e) would require that all bumper impact speed information be provdied to the Secretary of Transportation at the beginning of the applicable model year for the model involved. As soon as practicable after receiving the information, the Secretary shall compile, furnish, and distribute this information in a simple and readily understandable form in order to facilitate comparison among the various types of passenger motor vehicles. The Secretary may require automobile dealers to distribute to prospective purchasers bumper information compiled by the Secretary.

Subsection (f) defines "passenger motor vehicle" as any vehicle to which the bumper standard issued under part 581 of title 49, Code of Federal Regulations, is applicable.

The Committee would require manufacturers to make the disclosure at the point of sale because it believes this approach would be the least burdensome, most cost-effective, most expeditious way to get this information to consumers. In order to use effectively information on bumpers, the Committee believes such information must be in a visible place on the car at the point of sale.

Nothing in this section is intended to preclude NHTSA from conducting its own tests of bumpers in order to confirm the accuracy of disclosures by manufacturers.

Additionally, this section would require NHTSA to collect and distribute bumper disclosure information provided by manufacturers to prospective purchasers. The Committee intends that this information be available to purchasers and be presented in a way that would be of use to them. After NHTSA collects the information, the Committee intends that it be widely distributed so as to facilitate comparison among makes and models of vehicles by prospective purchasers. To this end, the Committee has provided NHTSA with the authority to require dealers to distribute this information to purchasers. The Committee expects NHTSA to move ahead expeditiously in implementing the labeling and consumer information requirements of this section.

SECTION 307—STATE MOTOR VEHICLE SAFETY INSPECTION PROGRAMS

This section amends part A of title III of the Cost Savings Act and adds new section 304. Subsection (a) would require the Secretary of Transportation to enter into appropriate arrangements with the National Academy of Sciences to conduct a study of the effectiveness of various State motor vehicle safety inspection programs in reducing highway accidents that result in injuries and deaths, and that limit the number of defective or unsafe motor vehicles on the highways.

Subsection (b) would require that the study include an evaluation of the implementation, inspection criteria, personnel, budgeting, and enforcement of all types of State motor vehicle safety inspection programs, including, but not limited to, inspections of motor vehicle brakes, glass, steering, suspension, and tires. If warranted, the Academy shall develop and submit to Congress recommendations for an effective and efficient State motor vehicle safety inspection program.

Subsection (c) would require that the study consider the feasibility of use by States of private organizations to conduct motor vehicle safety inspection programs and of combining safety and emisson inspection programs.

Subsection (d) would require that appropriate public and private agencies and organizations be consulted in the course of the study.

Subsection (e) would require the study to be completed and transmitted to the Congress within 18 months after funds are available for the study and the proper arrangements have been completed. The Committee does not intend that NHTSA sacrifice other programs to carry out this study. Both the Academy and NHTSA should accelerate efforts to complete the needed arrangements.

NHTSA testified in 1984 that a study of this type would not be useful and that the agency had contracted to conduct a critical review of the literature to assess the benefits and effectiveness of Periodic Motor Vehicle Inspection (PMVI) programs. However, this January 1985 NHTSA study, "Cost-Effectiveness of Periodic Motor Vehicle Inspection, a Review of the Literature" concluded that PMVI had potential benefits and that more research was necessary:

> In conclusion, there is little question that periodic motor vehicle inspection can lead to somewhat improved vehicle condition, and that "better vehicles" have some potential for lower involvement in accidents . . . more credible research efforts are needed before making any final conclusion regarding PMVI cost-effectiveness.—(DOT HS806750 at p. 26).

The Committee believes that this study will provide research with which to assess better the potential of PMVI in reducing accidents, injuries, and property damage. By assembling the best experts in the field, the Academy can draw on all available resources to determine the effectiveness of these programs and develop, if warranted, recommendations for more efficient and effective programs.

SECTION 308—RECALL OF CERTAIN MOTOR VEHICLES

Subsection (a) of this section would amend section 153 of the Safety Act to add a new subsection (d) to authorize the Secretary of Transportation to require manufacturers to send follow-up notifications to vehicle and equipment owners to enhance safety defect and non-compliance recall response rates. DOT's review of techniques such as post-card reminders to increase recall response rates shows that a follow-up notice can achieve response rates significantly higher than those achieved by the initial notification. The nature of the follow-up notification would be determined by the Secretary of Transportation through rulemaking.

Subsection (a) would also add a new subsection (e) to section 153 of the Safety Act to require a lessor of a leased motor vehicle to forward a recall notice to a lessee. Currently, there is no requirement for a lessor to notify a lessee that the leased vehicle is subject to a recall for safety defects or non-compliance with applicable Federal motor vehicle safety standards. The new requirement established by this section would apply in the case of any vehicle leased for a term of four months or more by a lessor who has leased at least 5 vehicles in the 12 months preceding the receipt of the recall notice. The Secretary of Transportation would be required to issue any regulations relating to the means of forwarding the notice and the time within which a notice must be forwarded. The section would take effect on the effective date of the implementing regulations.

Subsection (b) of this section would amend section 154 of the Safety Act to add a new subsection (d) to require a motor vehicle dealer to remedy any new motor vehicle or item of motor vehicle equipment in the dealer's possession for which the dealer has received a notice of recall for safety defects or non-compliance with applicable Federal motor vehicle safety standards before selling or leasing the vehicle or item of vehicle equipment. Other provisions of the Act insure that any financial burden resulting from this requirement would fall on the manufacturer rather than on the dealer. This amendment to the Safety Act is technical in nature and is intended to close a loophole that exists in the Safety Act. Currently, it is possible under the Safety Act for a dealer to sell or lease a new vehicle or item of vehicle equipment to an unsuspecting buyer or lessee after the dealer is notified by the manufacturer of a safety defect.

NHTSA has received reports from consumers who have bought new cars and have afterwards discovered that the cars had been the subject of recall notices issued before they purchased them. Similarly, there have been reports of lessees who have brought leased vehicles in for repairs, to discover that the vehicles should have been recalled. In such cases, the owners or lessees of the vehicles may be unknowingly driving vehicles which pose potential hazards to them.

As a general rule, the issuance of a notice recalling vehicles from safety defects prompts a high percentage of owners to bring their vehicles to be remedied. Over time, however, experience with the recall program has pointed to several improvements which could be made. The Committee hopes that this section would result in an increase in the percentage of vehicles recalled.

SECTION 309—STUDY OF DARKENED WINDOWS

This section would require NHTSA to conduct a study of the use of darkened windshields and window glass in passenger automobiles and to report the results of such study within six months to the Senate and House Commerce Committees.

This section addresses the potential safety and law enforcement problems posed by the increasing practice of darkening the glass in motor vehicles through the application of tinting films. NHTSA has issued a standard to regulate glazing materials in new motor vehicles. Among its other requirements, the standard has the effect of limiting the amount of window tinting that can be safely permitted. The standard provides the light transmittance for driving visibility must be at least 70 percent through any glazing.

A manufacturer must certify that the glazing used in its vehicles conforms to the Federal standard. Any person who manufactures or sells a new vehicle that does not conform to the standard is subject to civil penalties and recall action under the Safety Act. This includes any person who places tinting film on glazing in a new vehicle prior to sale.

Used vehicles are also affected by this standard, in that the Safety Act provides that a manufacturer, distributor, dealer, or motor vehicle repair business may not add tinting to windows in a motor vehicle if the tinting would take the vehicle out of compliance with the Federal standard. Notwithstanding this requirement, an extensive aftermarket tinting business has arisen in the past few years, principally in the South and Southwest, but also in other parts of the country.

This tinting may present safety problems for vehicle driver, who may lose a significant amount of vision, and for bicyclists and pedestrians, who may be prevented from seeing objects or vehicles on the other side of the vehicles with tinted windows. There is also a problem of a different order for law enforcement officers, whose safety may depend on being able to see weapons inside a vehicle.

This section would require a thorough study of the safety consequences of glazing in consultation with appropriate industry representatives and with law enforcement officials. In the course of the study, NHTSA should also examine State and local regulations and enforcement efforts.

SECTION 310—ODOMETER MODIFICATION

This section amends section 408(d) of the Cost Savings Act to require that an odometer reading for a vehicle be recorded each time the vehicle is registered in any State. Under current law, the odometer reading need only be recorded each time the vehicle changes ownership.

This section inserts language granting the Secretary of Transportation rulemaking authority to prevent falsification of mileage information and prescribe the form used on titles to insure compliance. The amendment also authorizes the Secretary of Transportation to promulgate rules concerning State actions to be taken in response to unauthorized alteration of titles or other documents on which odometer information is required. Finally, this section precludes the Secretary of Transportation from approving State alternative requirements without a finding that the alternative is consistent with the Cost savings Act's provisions. Under current law, the Secretary of Transportation must make a finding that the alternative requirement is not consistent with the Cost Savings Act's purposes.

Congress first attacked odometer tampering in 1972, with the passage of the Cost Savings Act, which made odometer tampering a Federal offense. Enforcement efforts, however, were largely unsuccessful. According to NHTSA, each year the odometers on over three million used cars sold in the United States are rolled back. Odometer rollbacks average 30,000 miles per car, and American consumers lose as much as three billion dollars each year because of the effect such tampering has on the value and servicing of used motor vehicles.

In the last Congress, the Committee approved the Truth in Mileage Act or 1986. This legislation would have strengthened the weakest link in the enforcment mechanism—the lack of periodic records of mileage readings. As unanimously approved by the Committee and the full Senate in 1985, the Truth in Mileage Act would have put an end to odometer rollbacks by creating a "paper trail" reflecting odometer readings on at least an annual basis.

Unfortunately, the House deleted some of the provisions of the Truth in Mileage Act so that, as signed into law on October 28, 1986 (P.L. 99-579), the Cost Saving Act would requre odometer disclosures only when title to a vehicle passes from an owner to a buyer. This section would restore the previous Senate provision.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman):

THE NATIONAL TRAFFIC AND MOTOR VEHICLE SAFETY ACT OF 1966

Section 103 of that Act

SEC. 103. (a)-(i) * * *

(j)(1) The Secretary shall establish a schedule for use in ensuring compliance with each Federal motor vehicle safety standard established under this Act which the Secretary determines is capable of being tested. Such schedule shall ensure that each such standard is the subject of testing and evaluation on a regular, rotating basis.

(2) The Secretary shall, not later than six months after the date of enacment of this subsection, conduct a review of the method for the collection of data regarding accidents related to Federal motor vehicle safety standards established under this Act. The Secretary shall consider the desirability of collecting data in addition to that information collected as of the date of enactment of this subsection, and shall estimate the costs involved in the collection of such additional data, as well as the benefits to safety likely to be derived from such collection. If the Secretary determines that such benefits outweight the costs of such collection, the Secretary shall collect such additional data and utilize it in determining which motor vehicles should be the subject of testing for compliance with Federal motor vehicle safety standards established under this Act.

Section 109 of that Act

SEC. 109. (a) Whoever violates any provision of section 108, or any regulation issued thereunder, shall be subject to a civil penalty of not to exceed $1,000 for each such violation. Such violation of a provision of section 108, or regulations issued thereunder, shall constitute a separate violation with respect to each motor vehicle or item of motor vehicle equipment or with respect to each failure or refusal to allow or perform an act required thereby, except that the maximum civil penalty shall not exceed $800,000 for any related series of violations. *The Secretary shall establish procedures for determining the manner in which, and the time within which, a determination should be made regarding whether a civil penalty should be imposed under this section. Nothing in this subsection shall be construed to limit the ability of the Secretary to exceed any time limitation specified for making any such determination where the Secretary determines that additional time is necessary for making a determination regarding whether a civil penalty should be imposed under this section.*

(b) * * *

Section 112 of that Act

SEC. 112. (a)(1) The Secretary is authorized to conduct any inspection or investigation—

(A) which may be necessary to enforce this title or any rules, regulations, or orders issued thereunder, or

(B) which relates to the facts, circumstances, conditions, and causes of any motor vehicle accident and which is for the purposes of carrying out his functions under this Act.

The Secretary shall establish written guidelines and procedures for conducting any inspection or investigation regarding noncompliance with this title or any rules, regulations, or orders issued under this title. Such guidelines and procedures shall indicate timetables for processing of such inspections and investigations to ensure that such processing occurs in an expeditious and thorough manner. In addition, the Secretary shall develop criteria and procedures for use in determining when the results of such an investigation should be considered by the Secretary to be the subject of a civil penalty under section 109 of this title. Nothing in this paragraph shall be construed to limit the ability of the Secretary to exceed any time limitation specified in such timetables where the Secretary determines that additional time is necessary for the processing of any such inspection or investigation.

The Secretary shall furnish the Attorney General and, when appropriate, the Secretary of the Treasury any information obtained indicating noncompliance with this title or any rules, regulations, or orders issued thereunder, for appropriate action. In making investigations under subparagraph (B), the Secretary shall cooperate with appropriate State and local officials to the greatest extent possible consistent with the purposes of this subsection.

(2) * * *

(b)-(e) * * *

Section 121 of that Act

SEC. 121. There are authorized to be appropriated for the purpose of carrying out this Act, $51,400,000 for fiscal year 1983, $55,000,000 for fiscal year 1984, [and] $58,700,000 for fiscal year 1985[.] *$53,733,000 for fiscal year 1988, and $55,233,000 for fiscal year 1989.*

Section 153 of that Act

SEC. 153. (a)-(c) * * *

(d) If the Secretary determines that a notification sent by a manufacturer pursuant to subsection (c) of this section has not resulted in an adequate number of vehicles or items of equipment being returned for remedy, the Secretary may direct the manufacturer to send a second notification in such manner as the Secretary may by regulation prescribe.

(e)(1) Any lessor who receives a notification required by section 151 or 152 pertaining to any leased motor vehicle shall send a copy of such notice to the lessee in such manner as the Secretary may by regulation prescribe.

(2) For purposes of this subsection, the term "leased motor vehicle" means any motor vehicle which is leased to a person for a term of at least 4 months by a lessor who has leased 5 or more vehicles in the 12 months preceding the date of the notification.

Section 154 of that Act

SEC. 154. (a)–(c)* * * *

(d) If notification is required under section 151 or by an order under section 152(b) and has been furnished by the manufacturer to a dealer of motor vehicles with respect to any new motor vehicle or new item of replacement equipment in the dealer's possession at the time of notification which fails to comply with an applicable Federal motor vehicle safety standard or contains a defect which relates to motor vehicle safety, such dealer may sell or lease such motor vehicle or item of replacement equipment only if—

(1) the defect or failure to comply has been remedied in accordance with this section before delivery under such sale or lease; or

(2) in the case of notification required by an order under section 152(b), enforcement of the order has been restrained in an action to which section 155(a) applies or such order has been set aside in such an action.

Nothing in this subsection shall be construed to prohibit any dealer from offering for sale or lease such vehicle or item of equipment.

THE MOTOR VEHICLE INFORMATION AND COST SAVINGS ACT

Section 2 of that Act

DEFINITIONS

SEC. 2. For the purpose of this Act (except title V and except as provided in section 601 of this Act)—

(19)(A) The term "passenger automobile" means a motor vehicle with motive power, except that the term does not include a multipurpose passenger vehicle, a motorcycle, a bus, a truck, or a trailer designed for carrying 10 persons or less.

(B) As used in subparagraph (A) of this paragraph, the term "multipurpose passenger vehicle" means a motor vehicle with motive power, other than a trailer and a motorcycle, with a gross vehicle weight under 10,000 pounds and which is designed to carry 10 persons or less and which is constructed either on a truck chassis or with special features for occasional off-road operation.

Section 102 of that Act

SETTINGS OF STANDARDS

SEC. 102.* * *

DISCLOSURE OF BUMPER IMPACT CAPABILITY

SEC. 102A. (a) The Secretary shall promulgate, in accordance with the provisions of this section, a regulation establishing passenger *motor vehicle bumper system labeling requirements. Such regulation shall apply to passenger motor vehicles manufactured for model years beginning more than 180 days after the date such regulation is promulgated, as provided in subsection (c)(2) of this section.*

(b)(1) The regulation required to be promulgated in subsection (a) of this section shall provide that, before any passenger motor vehicle is offered for sale, the manufacturer shall affix a label to such vehicle, in a format prescribed in such regulation, disclosing an impact speed at which the manufacturer represents that the vehicle meets the applicable damage criteria.

(2) For purposes of this subsection, the term "applicable damage criteria" means the damage criteria applicable under section 581.5(c) of title 49, Code of Federal Regulations (as in effect on October 1, 1984).

(c)(1) Not later than 90 days after the date of enactment of this section, the Secretary shall publish in the Federal Register a proposed initial regulation under this section.

(2) Not later than 150 days after such date of enactment, the Secretary shall promulgate a final initial regulaton under this section.

(d) The Secretary may allow a manufacturer to comply with the labeling requirements of subsection (b) of this section by permitting such manufacturer to make the bumper system impact speed disclosure required in subsection (b) of this section on the label required by section 506 of this Act or section 3 of the Automobile Information Disclosure Act (15 U.S.C. 1232).

(e) The regulations promulgated under subsection (a) of this section shall provide that the information disclosed under this section be provided to the Secretary at the beginning of the model year for the model involved. As soon as practicable after receiving such information, the Secretary shall furnish and distribute to the public such information in a simple and readily understandable form in order to facilitate comparison among the various types of passenger motor vehicles. The Secretary may by rule require automobile dealers to distribute to prospective purchasers any information compiled to this subsection.

(f) For purposes of this section, the term "passenger motor vehicle" means any motor vehicle to which the standard under part 581 of title 49, Code of Federal Regulations, is applicable.

Section 111 of that Act

AUTHORIZATION OF APPROPRIATIONS

Sec. 111. There are authorized to be appropriated to carry out this title $320,000 for fiscal year 1983, $343,000 for fiscal year 1984, **[**and**]** $365,000 for fiscal year 1985,**[**.**]** *$363,000 for fiscal year 1988, and $363,000 for fiscal year 1989.*

Section 201 of that Act

CONSUMER INFORMATION

Sec. 201. (a)–(e) * * *

(f)(1) The Secretary shall, within 30 days after the date of enactment of this subsection, enter into appropriate arrangements with the National Academy of Sciences to conduct a comprehensive study

and investigation regarding means of establishing a method for calculating a uniform numerical rating which will enable consumers to compare meaningfully the crashworthiness of different passenger automobile models.

(2) Such study shall include examination of current and proposed crashworthiness tests and testing procedures and shall be directed to determining whether additional objective, accurate and relevant information regarding the comparative crashworthiness of different passenger automobile models reasonably can be provided to consumers by means of a crashworthiness rating rule. Such study shall include examination of at least the following proposed elements of a crashworthiness rating rule:

(A) information on the degree to which different passenger automobile models will protect occupants across the range of motor vehicle crash types when in use on public roads;

(B) a repeatable and objective test which is capable of identifying meaningful differences in the degree of crash protection provided occupants by the vehicles tested, with respect to such aspects of crashworthiness as occupant crash protection with and without use of manual seat belts, fuel system integrity, and other relevant aspects;

(C) ratings which are accurate, simple in form, readily understandable and of benefit to consumers in making informed decisions in the purchase of passenger automobiles;

(D) dissemination of comparative crashworthiness ratings to consumers either at the time of introduction of a new passenger automobile model or very soon after such time of introduction; and

(E) the development and dissemination of crashworthiness data at a cost which is reasonably balanced with the benefits of such date to consumers in making informed purchase decisions.

(3) Any such arrangement shall require the National Academy of Sciences to report to the Secretary and the Congress not later than 19 months after the date of enactment of this subsection on the results of such study and investigation, together with its recommendations. The Secretary shall, to the extent permitted by law, furnish to the Academy upon its request any information which the Academy considers necessary to conduct the investigation and study required by this subsection.

(4) Within 60 days after transmittal of the report of the National Academy of Sciences to the Secretary and the Congress under paragraph (3) of this subsection, the Secretary shall initiate a period (not longer than 90 days) for public comment on implementation of the recommendations of the National Academy of Sciences with respect to a rule promulgated under this title establishing an objectively based system for determining and publishing accurate comparative crashworthiness ratings for different passenger automobiles.

(5) Not later than 180 days after the close of the public comment period provided for in paragraph (4) of this subsection, the Secretary shall determine, on the basis of the report of the National Academy of Sciences and the public comments on such report, whether an objectively based system can be established by means of which accurate and relevant information can be derived that reasonably predicts the degree to which different makes and models of passenger

automobiles provide protection to occupants against the risk of personal injury or death as a result of motor vehicle accidents. The Secretary shall promptly publish the basis of such determination, and shall transmit such determination to the Congress.

(g)(1) If the Secretary determines that the system described in subsection (f)(5) of this section can be established, the Secretary shall, subject to the exception provided in paragraph (2) of this subsection, not later than three years after the date of enactment of this subsection, promulgate a rule under this section establishing an objectively based system for determining and publishing accurate comparative crashworthiness ratings for different passenger automobiles. The rule promulgated under this subsection shall be practicable and shall provide to the public relevant objective information in a simple and readily understandable form in order to facilitate comparison among the various makes and models of passenger automobiles so as to contribute meaningfully to informed purchase decisions.

(2) The Secretary shall not promulgate such rule unless (A) a period of 60 calendar days has passed after the Secretary has transmitted to the Committee on Commerce, Science, and Transportation of the Senate and to the Committee on Energy and Commerce of the House of Representatives a summary of the comments received during the period for public comment specified in subsection (f)(4) of this section, or (B) each such committee before the expiration of such 60-day period has transmitted to the Secretary written notice to the effect that such committee has no objection to the promulgation of such rule.

(h) If the Secretary promulgates a rule under subsection (g) of this section, not later than three years after the date of enactment of this subsection, the Secretary shall by rule establish procedures requiring passenger automobile dealers to make available to prospective passenger automobile purchasers information developed by the Secretary and provided to the dealer which contains data comparing the crashworthiness of passenger automobiles.

Section 209 of that Act

AUTHORIZATION OF APPROPRIATIONS

SEC. 209. There are authorized to be appropriated to carry out this title $1,677,000 for fiscal year 1983, $1,800,000 for fiscal year 1984 [and] $1,950,000 for fiscal year 1985[.] *, $2,301,000 for fiscal year 1988, and $2,301,000 for fiscal year 1989.*

Section 303 of that Act

APPLICATIONS AND ASSISTANCE

SEC. 303. * * *

STATE MOTOR VEHICLE SAFETY INSPECTION PROGRAMS

SEC. 304. (a) The Secretary shall, within 30 days after the date of enactment of this section, enter into appropriate arrangements with the National Academy of Sciences to conduct a study of the effectiveness of State motor vehicle safety inspection programs in—

(1) reducing highway accidents that result in injuries and deaths; and

(2) limiting the number of defective or unsafe motor vehicles on the highways.

(b)(1) The study shall include an evaluation of the implementation, inspection criteria, personnel, budgeting, and enforcement of all types of State motor vehicle safety inspection programs or periodic motor vehicle inspection programs, including inspections of motor vehicle brakes, glass, steering, suspension, and tires.

(2) If warranted by the study, the National Academy of Sciences shall develop and submit to the Congress recommendations for an effective and efficient State motor vehicle safety inspection program.

(c) The study shall also consider the feasibility of use by States of private organizations to conduct motor vehicle safety inspection programs and of combining safety and emission inspection programs.

(d) Appropriate public and private agencies and organizations, including the Secretary, the Administrator of the Environmental Protection Agency, affected industries and consumer organizations, State and local officials, and the motor vehicle insurance industry should be consulted in conducting the study required under this section.

(e) Subject to the availability of funds and when the arrangements with the National Academy of Sciences are completed, the study required by subsection (a) shall be completed and transmitted to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Energy and Commerce of the House of Representatives within 19 months after the date of enactment of this section.

Section 408 of that Act

DISCLOSURE REQUIREMENTS

SEC. 408. (a)-(d)(2) * * *

(3) No registration card may be issued in any State for any motor vehicle unless the application for such registration card contains the information specified in subsection (a) (1) and (2), determined as of the date on which such application is submitted. Each State shall maintain such information, together with the vehicle identification number for the motor vehicle to which such information pertains, for a period of 5 years after the information is received by the State.

(4) The Secretary shall promulgate such rules as may be necessary to avoid the printing of mileage information that is false, misleading or inaccurate. To prevent falsification or alteration of the mileage information required to be disclosed by a transferee in accordance with paragraph (2), the Secretary shall promulgate such rules as may be necessary regarding the specific form to be used on any title for compliance with the provisions of paragraph (2)(A)(iii). In addition, the Secretary shall promulgate rules regarding the actions to be taken by States with respect to the unauthorized alteration of titles for motor vehicles and other documents on which odometer information is required to be recorded or maintained.

(e)-(f)(1) * * *

[(2) The Secretary shall approve alternate motor vehicle mileage disclosure requirements submitted by a State unless the Secretary determines that such requirements are not consistent with the purpose of the disclosure required by subsection (d) or (e), as the case may be.]

(2) The Secretary shall not approve such alternate motor vehicle mileage disclosure requirements unless the Secretary determines that the alternate method for making such disclosure is consistent with the purposes of subsections (d) and (e).

(g) * * *

Section 417 of that Act

AUTHORIZATION OF APPROPRIATIONS

SEC. 417. There are authorized to be appropriated to carry out this title $183,000 for fiscal year 1983, $196,000 for fiscal year 1984, [and] $210,000 for fiscal year 1985[.] *, $560,000 for fiscal year 1988, and $560,000 for fiscal year 1989.*

TITLE 23, UNITED STATES CODE

Section 402 of That Title

§ 402. Highway safety programs

(a) Each State shall have a highway safety program approved by the Secretary, designed to reduce traffic accidents and deaths, injuries, and property damage resulting therefrom. Such programs shall be in accordance with uniform standards promulgated by the Secretary. Such uniform standards shall be expressed in terms of performance criteria. Such uniform standards shall be promulgated by the Secretary so as to improve driver performance (including, but not limited to, driver education, driver testing to determine proficiency to operate motor vehicles, driver examinations (both physical and mental) and driver licensing) and to improve pedestrian performance and bicycle safety. In addition such uniform standards shall include, but not be limited to, provisions for an effective record system of accidents (including injuries and deaths resulting therefrom), accident investigations to determine the probable causes of accidents, injuries, and deaths, vehicle registration, operation, and inspection, highway design and maintenance (including lighting, markings, and surface treatment), traffic control, vehicle codes and laws, surveillance of traffic for detection and correction of high or potentially high accident locations, [and] emergency services *, and a uniform system for handicapped parking designed to enhance the safety of handicapped and nonhandicapped individuals.* Such standards as are applicable to State highway safety programs shall, to the extent determined appropriate by the Secretary, be applicable to federally administered areas where a Federal department or agency controls the highways or supervises traffic operations. The Secretary shall be authorized to amend or waive standards on a temporary basis for the purpose of evaluating new or different highway safety programs instituted on an experimental, pilot, or demonstration basis by one or more States, including, but not limited to, such programs for identifying accident causes, adopting measures to reduce accidents, and evaluating effectiveness of such measures, where the Secretary finds that the public interest would be served by such amendment or waiver.

(b)-(k) * * * *

(l) For purposes of this section, a uniform system for handicapped parking designed to enhance the safety of handicapped and nonhandicapped individuals is a system which—

(1) adopts the International Symbol of Access (as adopted by Rehabilitation International in 1969 at its 11th World Congress on Rehabilitation of the Disabled) as the only recognized symbol for the identification of vehicles used for transporting individuals with handicaps which limit or impair the ability to walk;

(2) provides for the issuance of license plates displaying the International Symbol of Access for vehicles which will be used to transport individuals with handicaps which limit or impair the ability to walk, under criteria determined by the State;

(3) provides for the issuance of removable windshield placards (displaying the International Symbol of Access) to individuals with handicaps which limit or impair the ability to walk, under criteria determined by the State;

(4) provides that fees charged for the licensing or registration with handicaps do not exceed fees charged for the licensing or registration of other similar vehicles operated in the State; and

(5) for purposes of easy access parking, recognizes licenses and placards displaying the International Symbol of Access which have been issued by other States and countries.

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SENATE

REPORT
100-43

TRANSPORTATION EMPLOYEE SAFETY AND REHABILITATION ACT OF 1987

APRIL 15, 1987.—Ordered to be printed

Filed under authority of the order of the Senate of April 10 (legislative day, March 30), 1987

Mr. HOLLINGS, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

together with

ADDITIONAL AND MINORITY VIEWS

[To accompany S. 1041]

The Committee on Commerce, Science, and Transportation, having considered an original bill (S. 1041) to provide for testing for the use, without lawful authorization, of alcohol or controlled substances by the operators of aircraft, railroads, and commercial motor vehicles, and for other purposes, reports favorably thereon and recommends that the bill do pass.

PURPOSE OF THE BILL

The bill, as reported, would require the Secretary of Transportation (the "Secretary"), in the interest of safety, to issue rules within twelve months of enactment to establish drug and alcohol testing programs for certain individuals employed in safety-sensitive positions in the aviation, rail, and motor carrier industries.

The bill would require five types of testing, including random, pre-employment, post-accident, periodic recurring, and upon reasonable suspicion. It would also require the Secretary to ensure testing procedures are developed to protect individual privacy, ensure accountability and integrity of specimens, require confirma-

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tion of all positive screening tests, mandate the use of only certified and accredited laboratories, provide for the confidentiality of test results and medical histories, and ensure nondiscriminatory and impartial testing methods. It would also require the Secretary to mandate the development of rehabilitation programs for certain employees who are found to have used illegal drugs or alcohol.

Background and Needs

Drug and alcohol abuse has become an increasing problem in the workplace. Substance abuse leads to impaired memory, lethargy, reduced coordination, and a whole series of changes in heart, brain, and lung functions. These symptoms in workers have resulted in lost productivity for American businesses of as much as $100 billion a year, with significant increases in employee accident rates, health care costs, and absenteeism.

In the transportation sector, the costs of drug and alcohol use are clearly magnified. Whenever individuals board an airplane, train, or motor carrier, they put their lives into the hands of those who are being paid to ensure safe passage. This trust relies upon the vigilance of trained employees to remain alert to any possible occurrence that might endanger the safety of the traveling public. The potential for catastrophic disaster created by those who abuse alcohol and illegal drugs while working in safety-sensitive transportation positions mandates that every effort be made to eliminate the cause of that threat.

At no time was this made more evident than after the recent accident in Chase, Maryland between an Amtrak passenger train and a Conrail freight train, which resulted in 16 fatalities, 170 injuries, and $14 to $15 million in damages. To date, there has been no determination that illegal drugs caused this tragic accident. However, in that accident, which was the worst in Amtrak history, toxicological tests conducted by the National Transportation Safety Board showed that both the Conrail brakeman and engineer had signs of marijuana in their systems. In addition, testing indicates the brakeman had traces of the hallucinogenic drug PCP in his urine. Given the results of recent research which shows that certain drugs, such as marijuana, can impair an individual's performance up to 24 hours after consumption, substance abuse remains a serious matter of concern.

There have been a significant number of accidents in the railroad industry related to drug and alcohol usage. According to the Federal Railroad Administration (FRA), there were 48 accidents between 1975 and 1984 in which drugs or alcohol were "directly affecting" causes. These resulted in 80 injuries and 37 fatalities, and cost some $34 million in damages. In the past year, through the implementation of its post-accident drug and alcohol testing program, the FRA found that some 5 percent of the 759 rail employees tested showed signs of illicit drugs or alcohol in their systems.

In commercial aviation, while there have been no commercial air carrier accidents attributed to the use of drugs or alcohol, a problem with substance abuse clearly exists. For several years, the Air Line Pilots Association has administered a voluntary alcohol rehabilitation program in which some 800 commercial pilots have acknowledged and attempted to end their addiction to alcohol. In addition, in the past year, there have been a number of Federal Aviation Administration (FAA) air traffic controllers found to have been using marijuana and cocaine.

With respect to the commercial motor carrier industry, the number of alcohol and drug-related accidents has been high. Substance abuse by truck drivers was recently highlighted when the Insurance Institute for Highway Safety released the results of a 1986 study showing that of a random sample of 300 truck drivers, and among those 88 percent who agreed to be tested, 18 percent tested positive for the presence of controlled substances or alcohol. Additionally, representatives of the trucking industry testified at Committee hearings that illegal drugs are bought and sold with the aid of the CB radio at virtually every truck stop in the country. This testimony has been confirmed by a number of television and newspaper investigative reports.

Substance abuse is also a serious problem in the bus industry. During a November 1983 strike, Greyhound took applications from a group of experienced intercity bus drivers. Greyhound found that 30 percent of the applicants' urine samples tested positive for marijuana.

The problem with drug and alcohol use by truck and bus drivers appears to be worsening. Tennessee's arrests of commercial drivers for possession of drugs and alcohol went from 193 in 1983 to 838 in 1986. Tennessee's enforcement personnel only increased from 43 to 66 during this period.

This legislation is intended to deter the use of alcohol and drugs by those in these safety-sensitive positions through increased testing. The bill does this by requiring the testing of such employees in several situations: prior to employment, after an accident, during recurring situations such as physical examinations, and upon reasonable suspicion. The bill also requires the use of random testing of employees.

The Committee believes that increased testing is necessary to deter the use of illegal drugs and alcohol by employees in safety-sensitive positions. There are several instances where testing programs have acted as successful deterrents to the abuse of illegal drugs and alcohol. Within the Department of Transportation (DOT), the Coast Guard, which randomly tests its uniformed personnel, has found that the number of individuals testing positive has declined from 10.3 percent in fiscal year 1983, when the testing began, to 3.8 percent in fiscal year 1986. In the Navy, after only one year of random testing, it has been reported that positive test results have dropped from 10 percent to 5 percent. The FRA reports that its first year of limited, non-random, testing indicates a strong deterrent effect, with 1986 testing results indicating drug or alcohol use in 5 percent of those tested, compared to the 16 percent shown in autopsies performed after fatal accidents in past years.

Large numbers of transportation employees in safety-sensitive positions work in an environment with little, if any, direct supervision. Therefore, a strong deterrent, such as the threat of being detected and sanctioned for drug and alcohol use, is particularly needed. While all types of testing are needed to address specific situations, the key to deterrence is random testing. Under random testing, transportation employees in safety-sensitive positions will have no advance warning of when they might be tested. With an increased likelihood of detection, they will think twice about using illegal drugs or drinking on the job. It is the resultant elimination of drug and alcohol usage by such employees that this legislation is intended to address.

ACCURACY OF TESTING

In any drug and alcohol testing program accuracy is essential. This is necessary both to ensure that individuals do not escape detection, and most importantly, to ensure against erroneous positive test results.

Given the Committee's commitment to accuracy in testing and in protecting employees, it is important to address the issue of so-called "false positives." Opponents of drug testing will often cite the number of "false positives," particularly in initial screenings, as evidence against the accuracy of testing. It is true that in initial screenings the presence of drugs and alcohol can be indicated and that in subsequent confirmation tests a "negative" can be shown, leading to the conclusion that the first test constituted a "false positive." This inconsistency would be cause for significant concern if a second test were not required by the bill to confirm any initial screening which suggested a positive reading, and if any conclusion was attached to the results of the initial screening. The Committee has, however, taken great care to protect employees both by requiring that a second test of the highest laboratory quality be administered to confirm any initial screening which indicates the use, without lawful authorization, of alcohol or a controlled substance, and by requiring confidential treatment of the initial screening. No conclusion can be reached from the initial screening and any specimen testing negative on confirmation shall be reported as negative, without disclosure of the results of the screening test.

Estimates as to the level of accuracy in the initial screenings vary, although the Congressional Research Service, in a report entitled "Drug Testing for Illegal Substances," dated January 20, 1987, has stated that initial drug screening tests can be between 98 and 100 percent effective. At present, Gas Chromatography/Mass Spectrometry (GC/MS) is the method most widely used for confirmation testing. GC/MS is considered by technical experts and the Federal courts to be virtually 100 percent accurate when performed properly by knowledgeable lab personnel. This legislation requires that either GC/MS or another equally accurate test be used to confirm any initial screening which indicates the use, without lawful authorization, of alcohol or a controlled substance.

The safeguards included in the bill are intended to insure accuracy by protecting the integrity of samples, providing for a proper chain of custody, and ensuring that laboratories are properly equipped and meet Federal accreditation and proficiency standards necessary to provide for accurate test results.

THE CONSTITUTIONALITY OF DRUG AND ALCOHOL TESTING

I. The legislation's drug and alcohol testing of safety-sensitive transportation personnel complies with the fourth amendment

A. The Legislation's Drug and Alcohol Testing Program does not involve unreasonable searches

The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures. Its basic purpose is to safeguard the privacy and security of individuals against arbitrary invasions by government officials. As courts have held, obtaining bodily fluids for purposes of drug and alcohol testing is an action which implicates the Fourth Amendment. *See e.g., Schmerber* v. *California,* 384 U.S. 757 (1966) (blood); *Spence* v. *Farrier,* 807 F.2d 753, 755 (8th Cir. 1986); *But see, Natl. Treasury Employees Union* v. *Von Raab,* 808 F.2d 1057, 1060, 1062 (5th Cir. 1987) (Higginbothan, J., specially concurring), questioning whether requiring urine specimens from applicants for sensitive positions in the U.S. Customs Service "is a search or seizure at all." Assuming the legislation involves conduct judicially recognized as a search or seizure under the Fourth Amendment, the relevant inquiry, therefore, is whether the drug and alcohol testing of individuals employed in safety-sensitive positions in the transportation industry represents a reasonable, and thus constitutional, search and seizure. The Committee believes that the proposed legislation does not involve searches that are unreasonable under the Fourth Amendment.

1. *Safety-sensitive transportation employees have diminished expectations of privacy.*—In protecting against unreasonable searches and seizures, the Fourth Amendment protects an individual's expectation of privacy which society has deemed to be reasonable. Furthermore, the expectation of privacy is considered reasonable only if viewed objectively and if it is justifiable based on all the circumstances. *See e.g., Delaware* v. *Prouse,* 440 U.S. 648, 654 (1979); *Smith* v. *Maryland,* 442 U.S. 735, 740 (1979). However, a critical factor in determining whether a search is unreasonable is the expectation of privacy of the persons to be searched as it relates to the public interest in conducting a search.

In the employment context, the scope of a privacy expectation is circumscribed by the employer's discretion to prescribe conditions of employment. For example, applicants for Federal employment routinely submit to fingerprint checks, full field background investigations and physical and medical examinations. None of these activities have been found to be unreasonable searches and seizures in violation of an applicant's Fourth Amendment rights, because there is no reasonable expectation of privacy precluding an employer from inquiring into an applicant's fitness for the job. *Cf., Schlagenlauf* v. *Holder,* 379 U.S. 104, 114 (1964).

The Committee views alcohol and drug testing as another medical testing procedure designed to determine fitness for duty. Transportation employees are currently subject to various Federal regulations which either prohibit the use of illegal drugs or alcohol while on the job or require that they be drug or alcohol free prior to assuming their respective positions.

Currently, FAA regulations (14 C.F.R. section 91.11) prohibit persons from acting as crewmembers of civil aircraft within 8 hours after the consumption of any alcoholic beverage, while under the influence of alcohol, while using any drug that affects the person's faculties in any way contrary to safety, or while having .04 percent blood alcohol levels. In addition, DOT has announced that beginning in 1987, it will require that FAA and other agency employees performing safety-related functions be tested for drug use on a random basis. (On March 27, 1987, the Federal District Court for the District of Alaska preliminarily upheld a new FAA policy providing that the scheduled periodic physical examinations for certain classes of FAA employees will include a drug test. *National Association of Air Traffic Specialists* v. *Dole,* No. A87-073 (D. Alaska, March 27, 1987).

Additionally, FRA regulations (49 C.F.R. section 219), effective February 10, 1986, prohibit railroad employees in safety-sensitive functions from using or possessing controlled substances or alcohol on the job, from reporting or remaining on duty while under the influence or impaired by a controlled substance or alcohol, or while having .04 percent or greater blood alcohol content. Given their responsibility for ensuring regulatory compliance, railroad companies are required to exercise a high degree of supervisory vigilance to prevent alcohol and drug use, possession, or impairment on the job. Correspondingly, any employee who performs a covered service for a railroad on or after the effective date of the regulations is deemed to have given implied consent to reasonable cause drug and alcohol testing, including post-accident testing, and may be disqualified for service for a specified amount of time for refusing to cooperate with such testing requirements. Depending on the particular negotiated agreement, employees testing positive may be subject to dismissal by the railroad or may be required to undertake rehabilitation before they may return to a safety-related job.

With respect to commercial vehicles, under the Commercial Motor Vehicle Safety Act of 1986 (P.L. 99-570, section 12008), any commercial driver who is deemed to be under the influence of drugs or alcohol while operating a commercial vehicle loses his license for a minimum of a year for the first offense and permanently on the second offense. Additionally, the Federal Motor Carrier Safety regulations prohibit consumption of alcohol by a commercial driver four hours before the driver reports to duty as well as consumption or possession of alcohol or illegal drugs while on duty (49 CFR, section 392.4, 392.5).

Recent judicial decisions support the Committee's belief that this legislation will provide an additional determination of fitness for duty. In a case involving the status of a railroad's drug testing program under the Railway Labor Act, the court indicated that:

> It is beyond dispute that the drug screen is a new technique; the underlying purpose of the medical examinations, however, remains the same—to ensure all (railroad) employees are fit for duty. The drug screen is nothing more than a method designed to detect the presence of a newly emerging threat to that fitness.

Brotherhood of Maintenance of Way Employees v. *Burlington Northern Railroad Company,* 802 F.2d 1016, 1024 (8th Cir. 1986).

In *Division 241 Amalgamated Transit Union (AFL-CIO)* v. *Suscy,* 538 F.2d 1264, 1267 (7th Cir.), cert. denied, 429 U.S. 1029 (1976), the court upheld a transit company rule requiring bus drivers to submit to blood and urine tests after being involved in an accident or upon being suspected of being intoxicated or under the influence of drugs. According to the court, the test under the Fourth Amendment is reasonableness, and the city's paramount interest in promoting safety overrides whatever expectations of privacy employees in that situation have.

Therefore, although the Committee recognizes and respects the fact that employees of airline, railroad, or other commercial carriers possess constitutionally-recognized expectations of privacy while in the scope of their employment, the public interest in ensuring that these employees perform their duties free of drugs and alcohol is a paramount concern. The Committee considers this reasonable in light of the consequences that could ensue if drugs or alcohol impair the judgment of such employees.

2. The legislation calls for searches that are not unreasonable under the fourth amendment.—In general, a warrant substantiated with probable cause is required for a search to be considered reasonable under the Fourth Amendment. *See, Payton* v. *New York,* 445 U.S. 573, 586, 100 S.Ct. 1371, 1380, 63 L.Ed. 2d. 639 (1980). However, the Supreme Court has recognized circumstances in which the public interest is best served by a standard of reasonableness that stops short of probable cause. In *New Jersey* v. *T.L.O.,* 469 U.S. 325, 340 (1985), the Court reasoned that:

> Probable cause is not an irreducible requirement of a search. The fundamental command of the Fourth Amendment is that searches and seizures be reasonable and although both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search, . . . in certain limited circumstances neither is required.

"In each case, it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails." *Bell* v. *Wolfish,* 441 U.S. 520, 559 (1979). *Cf. Payton* v. *New York,* 445 U.S. 573, 586 (1980).

Following this legal tenet, courts have found warrantless searches not to be violations of the Fourth Amendment. In *Allen* v. *City of Marietta,* 601 F.Supp. 482 (N.D. Ga. 1985), the court upheld a city's requirement that electrical workers (whose jobs involved safety concerns), suspected of using drugs on the job, submit to urinalysis testing or face dismissal. The decision was based on a line of cases which balanced the individual's expectation of privacy against the government's right as an employer to investigate potential or suspected employee misconduct which is directly related to the employee's performance of the employee's duties and the government's performance of its responsibilities. Also, in *McDonnell* v. *Hunter,* 809 F.2d 1302, petition for rehearing en banc denied, February 23, 1987 (8th Cir. 1987), the court held in the context of a warrantless search that the most accurate way to determine whether correctional employees in daily contact with inmates were using or abusing drugs was to permit a limited form of uniform or random testing. The court approved drug testing on both a random basis and upon reasonable suspicion. Similarly, alcohol and drug testing of transportation personnel is reasonable to ensure safe transportation.

In closely regulated industries, an exception to the warrant and probable cause requirement has been carved out for searches of premises pursuant to an administrative inspection scheme. *See e.g., Donavan* v. *Dewey,* 452 U.S. 594 (1981) (coal mines); *Colonnade Catering Corp.* v. *United States,* 397 U.S. 72 (1970) (liquor industry). The principal justification for the search is to help obtain general compliance with the law by placing violators on notice that their transgressions will not go undetected. There are two interrelated requirements justifying a warrantless search pursuant to the administrative search exception. First, there must be a strong State interest in conducting an unannounced search. Second, the pervasive regulation of the industry must have reduced the justifiable expectations of the subject of the search. As there remains pervasive government regulation with respect to the safe operation of aviation, motor carrier, and rail modes of transportation, such administrative searches are appropriate, and drug and alcohol testing is a reasonable search to ensure transportation safety.

In *Shoemaker* v. *Handel,* 795 F.2d 1136 (3rd Cir. 1986), *cert. denied,* 107 S. Ct. 577 (1986), jockeys challenged the regulations adopted by the New Jersey Racing Commission permitting the State racing official, based upon either random basis or upon reasonable suspicion, to direct any jockey, trainer, or groom to submit to a breathalyzer or urine test to detect alcohol or drug use. The Third Circuit Court of Appeals held that the administrative search exception applied to warrantless searches of these employees due to the extent of government regulation of the industry. The court further stated:

> . . . where persons engaged in the regulated activity are the principal regulatory concern, the distinctions (between searches of premises and searches of persons) are not so significant that warrantless testing for alcohol and drug use can be said to be constitutionally unreasonable. 795 F.2d at 1142.

As an additional justification for the search the court also indicated:

> It is the *public's perception,* not the known suspicion that triggers the state's strong interest in conducting warrantless testing. *Id* (emphasis added)

In *Rushton* v. *Nebraska Public Power District,* No. CV 86–L–36 (D. Neb. Feb. 23, 1987) the Nebraska district court upheld a random drug testing program of certain nuclear power plant employees pursuant to the administrative search doctrine. The court held that due to the pervasive and comprehensive regulatory scheme of the nuclear power industry there was an overriding interest in maintaining public confidence in such employees. With respect to the transportation employees within safety-sensitive positions, the Committee believes that the regulatory scheme is pervasive and reflects the belief that society has a strong safety interest in maintaining a workplace free of drugs and alcohol.

B. Drug and alcohol testing is, as proposed, not intrusive

No intrusive search of seizure within the meaning of the Fourth Amendment is involved in directing an employee to report for a urine test any more than directing an employee to report for a medical examination. Urine samples are commonly collected and examined at medical examinations, including examinations required as a condition of employment. Privacy is preserved and intrusion avoided, provided the employee is not observed while supplying the sample. In *Mack* v. *United States,* No. 85 Civ. 5764 (S.D.N.Y. April 21, 1986), affirmed, No 86-6097 (2d Cir. March 30, 1987) (on grounds the appellant consented to the urinalysis) the court held:

> [T]he collection of a urine sample . . . is even less intrusive than a fingerprint which requires that one's fingers be smeared with grease and pressed against a paper. A urine sample calls for nothing more than a natural function performed by everyone several times a day—the only difference being the collection of the sample in a jar. Slip opinion at 7.

Whether a search is intrusive must be determined by balancing the public's interest in the information to be gained by the search and the individual's expectation of privacy. There is clearly a paramount governmental interest in monitoring and preventing drug and alcohol abuse in transportation. Yearly medical, pre-employment, or other testing methods in which the test date is known in advance of the actual test cannot by themselves assure the public that their trust has not been violated. The Committee believes random testing is necessary to reach those who are not visibly impaired by drug or alcohol use. The Eighth Circuit Court of Appeals specifically stated that:

> The use and abuse of marijuana or other illegal drugs frequently does not produce an externally obvious state of impairment . . . A user's judgment or clearheadedness may be impaired without any obvious physical sign of intoxication. It is the insidious nature of these substances that often the user's faculties are impaired and the damage done through a serious error on his part before he realized that he is impaired and without any sign of his impairment that could lead a supervisor or other person to intervene.

Brotherhood of Maintenance of Way Employees v. *Burlington Northern Railroad, supra,* 802 F.2d 1016, 1024 (8th Cir. 1986)

Balanced against the public's interest is a limited intrusion on the individual's privacy. The procedure of unobserved drug testing through urinalysis is one of most minimally intrusive searches in Fourth Amendment jurisprudence. *See, United States* v. *Mack, supra,* No. 55 Civ. 5764, aff'd No. 86-6097 (2d Cir. March 30, 1987), *Rushton* v. *Nebraska Public Power District, supra,* No. CV 86-L-306 (D. Neb. Feb. 23, 1987). *See also, Shoemaker* v. *Handel,* 619 F. Supp.

1089, 1101 (D.N.J. 1985), aff'd 795 F.2d 1136 (3rd Cir.) cert. denied 107 S.Ct. 577 (1986).

Furthermore, in *Mack*, the court ruled that a Federal Bureau of Investigation (FBI) agent had a diminished expectation of privacy in light of the FBI's strong interest in assuring that its agents' personal and professional affairs are beyond approach. Similarly, in *Division 241 Amalgamated Transit* v. *Suscy*, 538 F.2d 1264, *supra*, (7th Cir.), cert. denied, 429 U.S. 1029 (1976) the court held with respect to urine and blood tests of bus and train operators that a paramount interest in protecting the public outweighs the employee's expectation of privacy.

II. A Drug and Alcohol Testing Program, as proposed in the legislation, does not violate an employee's due process rights

Due process provides a shield against arbitrary and capricious deprivations of property. Among the concerns which may be most important in this context are whether positive tests will be subject to a second confirmatory test, whether confidentiality of test results will be assured, and whether a proper chain of custody will be provided. Whether the testing is on a random basis or on the basis of reasonable suspicion, the equipment and procedure to be used must provide sufficient guarantees of trustworthiness. *McDonnell* v. *Hunter, supra*, 809 F.2d 1302, 1309 (8th Cir. 1987).

Assuming transportation employees are endowed with constitutionally-protected property interests in their continued employment, the proposed bill has eliminated the perceived dangers to an individual's reputation and employment security by inserting a requirement that any initial positive reading be confirmed by a second test of greater sensitivity. Consequently, the potential dangers associated with false positive readings are dramatically reduced. The Committee expects that the second confirmatory test conform to the reliability currently recognized in the GC/MS test. This test has not been challenged and is 100% accurate in detecting the presence of drugs in urine. *Williams* v. *Secretary of the Navy* 787 F.2d 552 (Fed. Cir. 1986), *Lovvorn* v. *City of Chattanooga*, 647 F.Supp. 875, 878 (E.D. Tenn. 1986); *National Federation of Federal Employees* v. *Weinberger*, 640 F.Supp. 642, 648 (D.D.C. 1986).

An argument may be made that the GC/MS test is unreliable because of the potential for mislabeling samples or other laboratory procedural errors. However, there is no court decision holding that the possibility of laboratory error necessarily invalidates reliance upon evidence examined in a laboratory, See, *Rushton* v. *Nebraska Public Power District, supra*, No. CV86–L–306 (D. Neb. Feb. 23, 1987). In fact, laboratory urinalysis tests have been declared sufficiently reliable to the extent that, standing aline, they may support a finding beyond a reasonable doubt that a defendant committed a drug use crime. *United States* v. *Ridley*, 22 M.J. 43 (C.M.A.), cert. denied, 55 L.W. 3308 (Nov. 14, 1986). In *Spence* v. *Farrier, supra*, 807 F.2d 753, 756 (8th Cir. 1986), the court held that although errors are possible in drug testing, "(T)he margin of error is insignificant in light of the institutional goals" intended to be furthered.

The mere possibility that a laboratory mistake may occur in the future should not be the basis for striking down a testing program as violative of due process. This is especially true where a strict chain of custody procedure is used, including, for example, tamper-proof seals, witness confirmation, and the use of sealed bags during transport to the testing laboratory. This legislation directs the Secretary to prescribe the chain of custody procedures that would be utilized to ensure the individual's due process rights are protected. The legislation also directs that the test results should not be disclosed until the second confirmatory results are available. In addition, safeguards will be inserted in the legislation which will prevent the disclosure of personal medical information unrelated to the use of illegal drugs or alcohol. In *Shoemaker* v. *Handel, supra,* 795 F.2d 1136, cert. denied 107 S.Ct. 577 (1986) the court acknowledged that the medical disclosure resulting as a by-product of urinalysis created grave confidentiality concerns. Nonetheless, the *Shoemaker* court upheld the urine testing program because the confidentiality concerns had been carefully addressed in statutory regulations, as would be provided pursuant to this legislation.

Although cases have struck down, on due process grounds, drug testing programs that employed urinalysis tests, these cases can be factually distinguished from the proposed testing program according to the manner in which the tests were conducted. In *Capua* v. *City of Plainfield,* 643 F.Supp. 1507 (D.N.J. 1986), the court struck down as unconstitutional the firing of certain firefighters based on findings of a surprise urinalysis test. In that case, the firefighters were awakened in the night and forced to produce a urine sample while being observed. Those whose tested positive were immediately terminated without pay. The court also cited, as persuasive, the fact that no procedural safeguards were established and that no policy statements authorizing the testing were issued. In discussing the *Shoemaker* case, discussed previously, the court in *Capua* stated:

> Perhaps the most critical distinction between these two searches though, is the very careful protections built into the *Shoemaker* testing system and the complete absence of procedural safeguards in defendant's urinalysis program. 643 F.Supp. at 1519.

The court also held: "(T)he *Shoemaker* urinalysis was therefore qualitatively different from that at issue in this case and the district court's assessment of the intrusiveness of urinalysis is not controlling here." *Id.* at 1514 note 2. See also *Lovvorn* v. *City of Chattanooga, supra,* 647 F.Supp. 875, 880 (E.D. Tenn. 1986).

The proposed legislation enables the Secretary, FAA Administrator and the FRA Administrator to publish regulations regarding its urinalysis procedures. Assuming employees are:

(1) informed that a random drug testing program will be established;

(2) provided an opportunity to be heard prior to completion of the rulemaking;

(3) not subjected to direct surveillance while completing the test;

(4) chosen for random tests by some nondiscriminatory and impartial method; and

(5) given a second high-quality confirmatory test for all positive screening tests,

the test procedure should ensure that the individual's due process rights are respected.

Finally, the Committee affirms existing mechanisms in law or agreement through which employees may have an opportunity to challenge testing procedures or proposed disciplinary actions resulting from testing. In the upcoming rulemaking process, it is the Committee's expectation that the Secretary will address the question of hearing opportunities for affected individuals.

In conclusion, the Committee recognizes that individuals are protected from unreasonable searches and seizures. However, the Committee recognizes that a paramount interest exists in ensuring that transportation personnel entrusted with safety-sensitive responsibilities remain free from the effects of illegal drugs and alcohol. Maintaining the public trust in the country's transportation system cannot be compromised. Assuming regulations are promulgated which protect the individual's due process rights, any intrusion deemed to occur from the proposed testing methods is reasonable, in view of the governmental goals to be furthered by this legislation.

LEGISLATIVE HISTORY

The Committee has held several hearings on the need for legislation to combat drug and alcohol abuse in transportation industries. On February 18, 1986, Senator Danforth chaired a full Committee hearing on the drug and alcohol problem in commercial transportation. In the 100th Congress, the Surface Transportation Subcommittee, chaired by Senator Exon, held a hearing on February 17, 1987, on rail safety, which included a discussion of drug and alcohol abuse and the need for testing in the rail industry.

On February 20, 1987, Senator Hollings chaired a full Committee hearing to examine the need for legislation to require random drug and alcohol testing among employees in the commercial aviation, rail, truck, and bus industries. Witnesses testified on legislation to require random drug and alcohol testing, including S. 356, introduced by Senator Danforth, and S. 362, the Airline and Rail Passenger Safety Act, introduced by Senator Hollings. Among the witnesses was the Secretary, who testified in strong support of the need for random drug testing.

On March 10, the Committee met in open executive session to consider an original bill entitled the "Transportation Employee Safety and Rehabilitation Act of 1987". During consideration of the bill, an amendment was offered by Senator Exon to ensure that employee selection for random testing is done by a nondiscriminatory and impartial method, thus assuring that no employee is harassed or treated differently from other employees. The amendment was adopted by the Committee without objection. Then, on a vote of 19–1 the Committee ordered the original bill to be reported favorably.

SUMMARY OF MAJOR PROVISIONS

As reported, the bill requires the Secretary to issue rules within twelve months of enactment for aviation, rail, and motor carrier testing and rehabilitation programs for alcohol and drug misuse. It establishes the need for these programs through a series of findings on the critical importance of transportation safety, the effect drugs and alcohol can have on an individual's ability to perform, and the need for effective means of identification of drug and alcohol abuse.

The bill then establishes three specific programs.

AVIATION

1. The Administrator of the FAA is required to establish regulations to require air carriers and foreign air carriers to conduct pre-employment periodic recurring, random, and post-accident testing, as well as testing upon reasonable suspicion. The Administrator is required to establish a similar program for FAA employees in safety-sensitive positions. Employees covered include flight crews, flight attendants, mechanics, aircraft dispatchers, air traffic controllers, and airport screening contract personnel, as well as any other employees responsible for safety-sensitive functions, as determined by the Administrator.
2. The use, without lawful authorization, of alcohol or controlled substances by individuals serving in safety-sensitive positions is prohibited. The Administrator would have discretion to dismiss, or suspend or revoke the certificate of any individual testing positive for the unlawful use of alcohol or a controlled substance.
3. No individual who tests positive shall be allowed to return to his or her position unless he or she has completed a program of rehabilitation. If an individual tests and is confirmed positive, yet (a) refuses to undertake, (b) fails to complete, (c) already has completed a rehabilitation program once, or (d) is impaired by or under the influence of alcohol or drugs while on the job, he or she will be prohibited from returning to his or her safety-sensitive position.
4. Each air carrier and the FAA are required to establish rehabilitation programs offering the opportunity of treatment for their employees.
5. Any testing program is required to include procedures to protect individual privacy, ensure accountability of specimens, require confirmation of all positive screening tests, mandate the use of only certified and accredited laboratories, provide confidentiality of test results and medical histories, and ensure nondiscriminatory and impartial testing.
6. This statutory addition to the Federal Aviation Act of 1958 preempts State and local laws which might be inconsistent with its implementation.

RAILROADS

1. The Secretary is required to review existing FRA regulations governing alcohol and drug use in railroad operations. Random testing is added to the testing now conducted in pre-employment and post-accident situations and where there is reasonable cause. The Secretary shall consider the application of existing FRA rules to safety-related personnel in addition to those Hours of Service

Act (45 U.S.C. 61–646) employees (which include employees in train and engine service, dispatchers, operators, signal maintainers, and some yard masters) already covered under the current FRA regulations.

2. The Secretary shall require, as considered appropriate, disqualification or dismissal of any employee determined to have used or been impaired by alcohol while on duty, or to have used a controlled substance, whether on duty or not, except for medical purposes.

3. There is no change in the current FRA mandate that the railroads establish drug and alcohol rehabilitation programs, through which employees, either on their own initiative or when reported by a coworker, might step forward and receive help without being subject to disciplinary action.

4. Any testing program is required to include procedures to protect individual privacy, ensure accountability of specimens, require confirmation of all positive screening tests, mandate the use of only certified and accredited laboratories, provide confidentiality of test results and medical histories, and ensure nondiscriminatory and impartial testing.

5. The authority of the Secretary to continue in force, amend, or supplement the current FRA rules governing alcohol and drug use and testing is affirmed. The same preemption, applicable to other FRA rules, applies to these new rules under this new provision.

MOTOR CARRIERS

1. The Secretary is required to establish regulations to require motor carriers to conduct pre-employment, periodic recurring, and random testing for operators of commercial motor vehicles, as well as testing upon reasonable suspicion. Post-accident testing is required where there is a fatality or other serious accident involving bodily injury or significant property damage. The Secretary is also not precluded from providing that testing be conducted as part of the medical examination required of operators.

2. The Secretary shall promulgate regulations for programs of rehabilitation, including the circumstances under which operators shall be required to participate in such programs. Motor carriers are not precluded from establishing such programs in cooperation with other motor carriers.

3. Any testing program is required to include procedures to protect individual privacy, ensure accountability of specimens, require confirmation of all positive screening tests, mandate the use of only certified and accredited laboratories, provide confidentiality of test results and medical histories, and ensure nondiscriminatory and impartial testing.

4. This statutory addition to the Commercial Motor Vehicle Safety Act of 1986 preempts State and local laws which might be inconsistent with its implementation.

5. Under the Commercial Motor Vehicle Safety Act of 1986, a driver is disqualified from operating a commercial motor vehicle for a period of not less than one year if found to have operated such a vehicle while under the influence of alcohol or a controlled substance, and is disqualified for life if there is more than one such

violation of driving while under the influence. The Secretary is given discretion under this legislation to determine appropriate penalties for operators who are determined to have unlawfully used, but who are not under the influence of, alcohol or a controlled substance.

6. The Secretary is also required to design and implement, in four interested and representational States, a pilot program for random testing of the operators of commercial motor vehicles by an entity other than the carriers themselves, such as State enforcement agencies. $5,000,000 from funds for fiscal year 1988 under the Motor Carrier Safety Assistance Program would be available for carrying out this pilot program. This program addresses a situation unique to the motor industry and would provide the basis for a report to Congress regarding the effectiveness of such a program in identifying individuals, such as owner-operators and independent drivers, who might otherwise avoid detection through the carrier-administered testing established under this Act.

ESTIMATED COSTS

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and Section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, March 23, 1987.

Hon. ERNEST F. HOLLINGS,
Chairman, Committee on Commerce, Science and Transportation,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed the Transportation Employee Safety and Rehabilitation Act of 1987, as ordered reported by the Senate Committee on Commerce, Science, and Transportation, March 10, 1987.

This bill would amend legislation governing commercial aviation, rail and motor carriers to require drug and alcohol testing and offer employees opportunities to participate in rehabilitation programs. The Department of Transportation (DOT) would be required to review existing regulations and issue new standards to ensure these requirements are met and that testing programs include certain safeguards. Based on information provided by the DOT, CBO estimates that enactment of this bill would cost the federal government about $3 million to $4 million annually, once fully implemented and assuming appropriation of the necessary sums. We cannot presently estimate added costs for enforcing testing by private carriers, but that could cost several million dollars annually.

This bill would direct the Federal Aviation Administration (FAA) to establish a program for pre-employment, periodic and random testing of airline employees in "safety-sensitive" positions. In addition, the bill would require testing after fatal or otherwise serious accidents. The DOT would be directed to establish a similar program for motor carrier operators, and to review pertinent rules and regulations and require random drug testing of all railroad employees in "safety-sensitive" positions.

In addition, the FAA would be required to implement such a program for its own workers who perform "safety-sensitive" functions and to offer its employees opportunities to participate in rehabilitation programs. The FAA already conducts pre-employment and periodic recurring (annual) tests of all "safety-sensitive" employees, but does not perform random testing. Based on information provided by the DOT, CBO estimates that these provisions would cost the federal government approximately $3 million to $3.5 million per year, largely for random testing. (This assumes that each employee subject to these provisions would be tested randomly once a year.)

The Department of Transportation would incur some costs for implementing and enforcing new regulations governing testing of airline, railroad and motor carrier operators. While the extent of these costs is highly uncertain CBO expects that the cost of developing and implementing regulations would be between $200,000 and $500,000. The DOT would incur additional costs for enforcing testing requirements. While CBO lacks sufficient information to estimate these costs with precision, comprehensive enforcement efforts could cost several million dollars annually. The magnitude of this burden is highly dependent on the number of motor carrier operators who would be covered by drug testing requirements. The Administration has insufficient information to determine the number of affected operators, which would be determined by regulation.

The Secretary also would be required to design and implement a pilot program for random testing of commercial motor vehicle operators, with the participation of four states. The bill would set aside $5 million from funds otherwise made available for Motor Carrier Safety grants in fiscal year 1988 for this pilot program. The Anti-Drug Abuse Act of 1986 provided budget authority of $50 million for these grants in that year.

No significant costs would be incurred by state or local governments as a result of enactment of this bill.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,

Sincerely,

EDWARD M. GRAMLICH,
Acting Director.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, April 9, 1987.

Hon. ERNEST F. HOLLINGS,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has revised its estimate of the cost to state and local governments of the Transportation Employee Safety and Rehabilitation Act of 1987, as ordered reported by the Committee on Commerce, Science and Transportation on March 10, 1987. In our initial cost estimate, transmitted to the committee on March 23, 1987, we indicated that no significant costs would be incurred by state and local governments as a result of enactment of this bill. CBO now estimates that these governments would incur costs of at least $50 million annually to test motor vehicle operators for abuse of alcohol or use of illegal drugs.

The bill would direct the Department of Transportation to issue regulations requiring motor carriers to conduct pre-employment, periodic recurring, random and post-accident testing of operators of commercial motor vehicles for the use of alcohol or controlled substances. Under current law, most heavy vehicles operated directly by or under contract for local governments are defined as commercial motor vehicles, and operators of those vehicles would be covered by the drug testing requirements in this bill. Included would be operators of school buses, transit buses, sanitation trucks and road maintenance trucks. Approximately 470,000 school and transit bus drivers would be covered; we do not presently have sufficient information to estimate the number of truck drivers who would be affected. In addition to testing, local governments might also incur costs for litigation relating to collective bargaining and constitutional issues, and would bear some costs for rehabilitation programs.

State governments also operate some heavy vehicles, and therefore would incur some increased costs if this bill is enacted. CBO estimates, however, that state costs would be much less than those of local governments. Some costs initially borne by local governments, however, might be reimbursed by the states.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,

Sincerely,

EDWARD M. GRAMLICH,
Acting Director,

REGULATORY IMPACT STATEMENT

In accordance with paragrpah 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported.

NUMBER OF PERSONS COVERED

This legislation covers several modes of commercial transportation, each affecting varying numbers of employees. In aviation, the Committee estimates that approximately 172,500 domestic air carrier employees and FAA air traffic controllers will be covered by this legislation. Estimates of foreign air carrier employees are difficult, as the bill intends to cover only those employees who fly to or are stationed in this country. The Committee estimates that in the railroad industry, approximately 120,000 individuals will be affected by this legislation. Finally, approximately 3 million individuals employed as operators of commercial motor vehicles will be covered by the legislation.

ECONOMIC IMPACT

The major areas of economic impact upon the FAA and the respective transportation industries include testing costs, rehabilitation program costs, and employee assistance program costs. Generally, these costs are applicable to each of the three modes of transportation. They will, however, vary according to the number of affected employees, the frequency in which they are tested, and the number of employees in need of rehabilitation. Total transportation sector costs are difficult to estimate, because the bill does not establish a minimum number of times any individual or class of employeees must be tested, or require rehabilitation for employees who test positive.

Preliminary figures have placed the cost of initial screening and confirmatory tests, as well as the related administrative costs, at between $23–100 per employee, depending on the type of test used, the number of drugs tested, and the sensitivity of the test. In additional, testing costs can often be reduced through the joint purchasing power of trade associations or other organizations. Similarly, as testing becomes more widespread, it is possible the cost of testing will be lowered by the new volumes of testing required.

Rehabilitation program costs vary considerably based upon the type, location, and length of the program. Employee assistance program costs associated with the education, counseling and training of employees after rehabilitation are estimated to be $20–30 per employee.

PRIVACY

Testing of transportation employees in safety-sensitive positions will create an intrusion into the privacy of these individuals, which the Committee believes is justified, given the overwhelming public interest in safe transportation, and which is constitutional given the scope of the problem, the safeguards in the legislation and the diminished expectation of privacy of safety-sensitive employees.

PAPERWORK

With respect to paperwork requirements, the Committee recognizes that compliance with the regulations to be promulgated pursuant to this legislation potentially could be significant assuming that carriers will be required to certify to the Secretary that their testing and rehabilitation programs are operative and being properly administered, and that testing safeguards are being adhered to. However, the Committee expects that the Secretary will seek to minimize additional paperwork requirements wherever possible, through "piggyback" reporting, random auditing, or other appropriate methods.

SECTION BY-SECTION-ANALYSIS

SECTION 1—SHORT TITLE

This section states that the short title of the bill is the "Transportation Employee Safety and Rehabilitation Act of 1987".

SECTION 2—FINDINGS

This section contains the statement of Congressional findings emphasizing the need to eliminate drug and alcohol abuse throughout the country, and in particular, among those who are responsible for the safe movement of aircraft, trains, and commercial motor carriers. In this regard, increased testing, including the use of random testing, has been found successful in deterring the continued abuse of alcohol and drugs. Congress also finds that safeguards can be implemented to protect individual privacy, reduce the potential for harassment, and ensure against undue harm to a person's reputation or career. Finally, there is a recognition that rehabilitation is an important part of any testing program and should be made available, as appropriate.

SECTION 3—AVIATION

Section 3 of the bill would create a new section 613 in the Federal Aviation Act of 1958. New subsection (a)(1) of section 613 would require that within 12 months after enactment, the Administrator of the FAA shall issue regulations requiring air carriers and foreign air carriers to conduct pre-employment, periodic recurring, random, and post-accident testing of airmen, crew members, airport security screening contract personnel, and other air carrier employees responsible for safety-sensitive functions, as determined by the Administrator, as well as the testing of such individuals upon reasonable suspicion that they have used, without lawful authorization, alcohol or a controlled substance. With regard to controlled substances, the term "lawful authorization" implies drug use pursuant to a legitimate prescription issued by a medical doctor, within the prescribed level and which the Secretary considers permissible.

The alcohol and drug testing programs to be established under this subsection would apply to major domestic airlines, as well as commuter air carriers, air taxis, and certain fixed based operations, such as tour flights. Coverage does not extend to operators of general aviation aircraft or to other aircraft privately owned or operated and not held out for business. With respect to foreign air carriers, the bill is designed to cover those airlines that provide service to and from the United States. The Committee believes that, while there may be difficulties in implementation, it is necessary to ensure the testing of those individuals in the employment of foreign carriers who are responsible for the safety of United States citizens. To require the testing of these individuals, within the realities of international treaties, is important to the Committee's efforts to enhance aviation safety.

The bill would mandate the testing of a number of categories of employees, as well as those elected by the Administrator because of their employment in safety-sensitive positions. Those groups of employees required to be covered by the new testing programs include airmen, crew members, and airport security screening contract personnel. As defined in statute and regulation, this would require testing of the flight crews, flight attendants, air traffic controllers, mechanics, safety inspectors, and flight dispatchers. The Committee intends that the Administrator be very selective in extending the coverage of this provision to other categories of air carrier and FAA employees. While it is critical that, in the interest of safety, personnel responsible for the safety of passengers or employees be deterred from allowing drugs and alcohol to affect their ability to perform, section 613 should not be treated as an open authorization to test all aviation employees.

This subsection also specifies the conditions under which employees must be tested. Pre-employment and post-accident testing are self-evident. Testing will also be required when there is reasonable suspicion to believe that an individual is currently under the influence or impaired by alcohol or a controlled substance. Reasonable suspicion, as envisioned by this bill, does not require a showing of probable cause, as that term is typically difined in a legal sense. Rather, the Committee anticipates that reasonable suspicion testing will be similar to that under the current FRA rule which requires specific, personal observations concerning the appearance, behavior, speech, or body odors of the employee.

With respect to periodic recurring testing, there are several situations in which this could occur, including testing at the time of a physical examination. Many safety-sensitive employees are required to undergo periodic physicals, and testing at such an occasion would be appropriate under this provision.

With respect to random testing, the Committee does not believe it would be appropriate to suggest a minimum number of employees that should be randomly tested at a certain frequency. Rather, the Committee believes that it is better to give the Administrator the discretion to determine how specific programs should be administered. In determining how the programs are to be administered, the Administrator should take into account the cost of programs and their likely financial impact on carriers of different sizes. It is important, however, that each program provide adequate coverage to ensure effective deterrence of drug and alcohol misuse by safety-sensitive employees. Finally, as is noted in proposed subsection (d), in the section on testing safeguards, it is critical that regardless of the means chosen to select randomly employees for testing, that selection must be done in an impartial and nondiscriminatory manner, so as to minimize the potential for harassment.

New subsection (a)(2) requires the Administrator to establish a program of testing for FAA employees whose duties include responsibility for safety-sensitive functions. Such a program is required to include pre-employment, periodic recurring, random, and post-accident testing, as well as the testing of such individuals upon a reasonable suspicion that they have used, without lawful authorization, alcohol or a controlled substance. The Committee is aware that the FAA is currently conducting periodic recurring testing of certain safety-sensitive FAA employees. This provision is intended to provide explicit statutory authority for continuing that testing, as well as to provide explicit authority to expand current testing requirements.

New subsection (a)(3) requires that in prescribing regulations, the Administrator shall require, as the Administrator considers appropriate, the suspension or revocation of any certificate relating to air transportation, or the disqualification or dismissal of an individual, in any instance where an individual has been tested and confirmed to have used, without lawful authorization, alcohol or a controlled substance. This subsection is designed to provide the Administrator with the authority to sanction individual employees on a discretionary basis. It would not require that an employee who tests positive for drug or alcohol use necessarily be dismissed or have his or her certificate revoked. Rather, it would merely allow the Administrator to take such step directly, or to require an air carrier to do so, if such action were believed warranted by the Administrator.

New subsection (b)(1) would prohibit the use, without lawful authorization, of alcohol or a controlled substance by such individuals as stated in subsection (a)(1). This affirmative prohibition is intended to clarify that it is prohibited for an individual serving in a safety-sensitive position to have unlawfully used alcohol or illegal drugs.

New subsection (b)(2) prohibits any such individual who is determined to have used, without lawful authorization, alcohol or a controlled substance from serving in a safety-sensitive position unless that individual has completed a program of rehabilitation described in proposed subsection (c). This provison does not mandate that every individual who tests positive be admitted into such rehabilitation programs. If a carrier chooses to do so, it can remove an employee who tests positive from that safety-sensitive position. However, this proposed subsection would prohibit an individual who tests positive from returning to his or her safety-sensitive position unless he or she had completed a program of rehabilitation. The objective of this provision is to keep employees from returning to positions of critical importance unless they have successfully completed a program designed to end their abuse of either drugs or alcohol.

New subsection (b)(3) prohibits any such individual who is determined to have used, without lawful authorization, alcohol or a controlled substance from returning to their safety-sensitive position if such individual (A) refuses to undertake a program of rehabilitation described in new subsection (c); (B) fails to complete such a program; (C) has previously undertaken or completed such a rehabilitation program; or (D) has been determined by the Administrator to have served in a safety-sensitive position while impaired by or under the influence of alcohol or a controlled substance. This provision is intended to prohibit employees who test positive from returning to their safety-sensitive positions unless they complete a program of rehabilitation. It would also prohibit employees who test positive for a second time from returning to their safety-sensitive positions, Finally, any individual who is determined to have served in a safety-sensitive position while impaired by or under the influence of alcohol or drugs is prohibited from returning to that position.

New subsection (c)(1) proides that each air carrier and foreign air carrier shall establish and maintain a rehabilitation program which, at a minimum, provides for the identification and opportunity for treatment of employees referred to in new subsection (a). This section encourages each carrier to make such a program available to all of its employees. Air carriers are not precluded from establishing a rehabilitation program in cooperation with other air carriers.

New subsection (c)(2) requires the Administrator to establish and maintain a similar rehabilitation program for FAA employees whose duties include direct responsibility for safety of flight operations who are in need of assistance in resolving problems with the use of alcohol or controlled substances.

New subsection (d) requires the Administrator to develop procedures designed to safeguard individual rights and testing procedures, including:

—promoting individual privacy in the collection of specimen samples;

—requiring procedures for a chain of custody in order to ensure proper identification and integrity of specimens;

—providing for confirmation of all positive tests by a second test of higher laboratory quality;

—requiring that laboratories involved in testing shall comply with all applicable requirements of a State license, shall meet such accreditation and proficiency standards as the Secretary may establish, and shall have the capability and facility, at such laboratory, of performing screening and confirmation tests;

—providing for the confidentiality of test results and medical information, with the exception of the use of test results for the orderly imposition of appropriate sanctions; and

—ensuring that employees are selected for random tests by nondiscriminatory and impartial methods.

These safeguards are critical to the success of any testing program. They are designed to ensure that an individual's basic rights to privacy are protected and that there is accountability and accuracy of testing. They provide what the Committee believes are the basic minimums. As a result, the Administrator is urged to review carefully the safeguards in any testing program to ensure that they are adhered to in a vigorous manner.

Accuracy is an essential aspect of any testing program. In this regard, the Committee has not specified the type of test to be utilized in either the screening or confirmatory test. However, it is the Committee's intention that any screening test that indicates the presence, without lawful authorization, of a controlled substance shall be confirmed by a scientifically recognized method specific to the compound detected, that no report of a positive screening test shall be made until such confirmation, and that any specimen testing negative on confirmation shall be reported as negative without disclosure of the results of the screening test.

Testing for alcohol shall be conducted by a method capable of estimating, with known reliability, the current blood alcohol concentration of the individual, and provide that an employee testing positive for alcohol using a specimen other than blood shall be entitled, at that employee's option, to a blood test by a method specific to ethyl alcohol. Confirmation tests must be done using a testing procedure that has a proven record of accuracy. While this may be more costly, there is no substitute given the impact testing can have on an individual's career and life.

The safeguards to assure accurate laboratory testing under this subsection shall include State licensing, as well as the establishment by the Administrator of accreditation and proficiency standards. Because licensing standards vary from State to State, the Committee strongly believes that these safeguards must apply to assure the quality of laboratory testing procedures. In this regard, testing programs should, at a minimum, include specifications for minimum levels of experience and education needed by laboratory technicians, as well as the protocols to be followed in testing. In addition, the accuracy of laboratory testing programs must be periodically confirmed, to assure the proficiency of each laboratory.

The safeguards included in the bill also seek to protect individual privacy in the collection of samples, consistent with procedures that may be necessary to ensure the integrity of samples. It is the Committee's intent to protect individual privacy by ensuring that specimens may be analyzed only for the purpose of detecting alcohol and controlled substances designated by the Secretary, except for samples needed for Federally-required physical examinations. These specimens may not be analyzed for any other purpose. The Committee is also seeking to provide for the confidentiality of test results to the extent consistent with the orderly imposition of appropriate sanctions. It is understood that, in the case of this limitation, the FAA will have appropriate access for accident investigatory purposes, and that the pendency of judicial proceedings may necessitate some disclosures of test results. It is also the Committee's intent to provide for the confidentiality of non-drug and alcohol related medical information that may be provided by the employee or gained from the sample in connection with testing.

The safeguards also seek to ensure that employees are selected for random tests by nondiscriminatory and impartial methods. This is intended to ensure that no employee is harassed by being treated differently from other employees in similar circumstances. It has been suggested, for example, that a computer-generated random selection process might provide one possible method for minimizing the potential for harassment.

New subsection (e)(1) provides that no State or local government shall adopt any law, rule, regulation, ordinance, standard, or order that is inconsistent with the regulations promulgated under this section, with the exception of provisions of State criminal law which impose sanctions for reckless conduct leading to actual loss of life, injury or damage to property. Several States have enacted legislation, or are considering doing so, to prohibit or restrict drug and alcohol testing of certain classes of individuals. the Committee is concerned that these restrictions may impinge upon the ability of the Administrator to ensure effective implementation of this section, and therefore the Committee is acting to preempt those restrictions.

Proposed subsection (e)(2) states that nothing in this section shall preclude the Administrator from adopting or continuing in effect other safety regulations associated with the potential abuse of alcohol or controlled substances by such individuals.

Proposed subsection (f) defines the term "controlled substance" as meaning any substance under section 102(6) of the Controlled Substances Act whose use the Administrator has determined poses a risk to transportation safety. In this regard, the Committee is aware that the Controlled Substances Act covers hundreds of drugs, thus making it practically and financially difficult to administer testing programs on a widespread basis. The intention of this provision is to ensure that those drugs with the widest potential for abuse be included in the testing programs established under this section, but not the myriad of drugs that are specified in the Controlled Substances Act.

Section 3(b) of the bill makes changes to the table of contents of the Federal Aviation Act of 1958.

SECTION 4—RAILROADS

Section 4 of the bill amends section 202 of the Federal Railroad Safety Act of 1970. New subsection (l)(1) of section 202 would require that, within 12 months after enactment, the Secretary shall review existing Federal rules, regulations, standards, and orders governing alcohol and drug use in railroad operations for the purpose of determining whether they are adequate to ensure safety. The current FRA rules, which have been in operation since February 1986, represent, a significant effort in addressing the problem of alcohol and drug use in the railroad industry. This legislation supplements these rules, which have established precedents for the control of drugs and alcohol, testing and rehabilitation.

It is the Committee's intent that, in implementing rules necessary to ensure safety, the Secretary shall specifically require that all railroad employees determined by the Secretary to be responsible for safety-sensitive functions be subject to testing on a random basis for the use, without lawful authorization, of alcohol or a controlled substance. This would add a requirement for random testing to the current FRA rules which require testing in pre-employment, post-accident and reasonable cause situations. With regard to controlled substances, the term "lawful authorization" implies drug use pursuant to a legitimate prescription issued by a medical doctor, within the prescribed level and which the Secretary considers permissible.

With respect to random testing in the railroad industry, as in the aviation and motor carrier industries, the Committee does not believe it would be appropriate to suggest a minimum number of employees that should be randomly tested at a certain frequency. Rather, the Committee believes that it is better to leave it to the Secretary to determine how specific programs should be administered. In determining how the programs are to be administered, the Secretary should take into account the cost of programs and the likely financial impact on carriers, of different sizes. It is important, however, that each program provide adequate coverage to ensure effective deterrence of drug and alcohol usage by safety-sensitive employees. Finally, as is noted in proposed subsection (l)(2), in the paragraph on testing safeguards, it is critical that whatever means is chosen to select randomly employees for testing, that selection must be done in an impartial and nondiscriminatory manner, so as to minimize the potential for harassment.

The legislation also requires the Secretary to consider application of the existing rules, regulations, orders, and standards to other categories of employees, including employees responsible for the safety of passengers, railroad rolling stock, or track and related structures. Current FRA alcohol and drug rules apply to railroads and those employees covered by the Hours of Service Act. While it is not the Committee's intent to suggest any deficiency in the use of the Hours of Service Act as a classification of employees to whom alcohol and drug regulations apply, the Secretary should give careful consideration to this standard to ensure that all railroad employees whose duties include responsibility for safety-sensitive functions are covered by the FRA rules and this legislation. The Committee intends that the Secretary be very selective in extending the coverage of the provision to other categories of railroad employees. While it is critical that, in the interest of safety, personnel responsible for the safety of passengers or employees be deterred from allowing drugs and alcohol to affect their ability to perform, proposed section 202(l) should not be treated as an open authorization to test all railroad employees.

The Secretary shall require, as the Secretary considers appropriate, the disqualification or dismissal of any employee determined to have used or to have been impaired by alcohol while on duty; and the disqualification or dismissal of any employee determined to have used a controlled substance, whether on duty or not on duty, except as permitted for medical purposes and by rules, regulations, standards, or orders issued under this Act. These provisions are designed to provide the Secretary with the authority to sanction individual employees on a discretionary basis. It would not require that an employee who tests positive for drug or alcohol use be dismissed or disqualified by either the Secretary or the railroad. Rather, it would merely allow the Secretary to take such a step directly, or to require a railroad to do so, if such action were believed warranted by the Secretary.

It is not the Committee's intent, in this subsection, to restrict the discretion of the Secretary to continue in force, amend, or further supplement any rules, regulation, standards and orders governing alcohol and drug use in railroad operations issued before the date of enactment of this subsection. These include, but are not limited to, rules prohibiting drug and alcohol use, prescribing alcohol and drug testing requirements and establishing employee assistance and rehabilitation programs.

New subsection (l)(2) requires the Secretary to develop procedures designed to safeguard individual rights and testing procedures, including:

—promoting individual privacy in the collection of specimen samples;

—requiring procedures for a chin of custody in order to ensure proper identification and integrity of specimens;

—providing for confirmation of all positive tests by a second test of higher laboratory quality;

—requiring that labortories involved in testing shall comply with all applicable requirements of a State license, shall meet such accreditation and proficiency standards as the Secretary may establish, (which, when established, shall preempt any inconsistent State requirements) and shall have the capability and facility, at such laboratory, of performing screening and confirmation tests;

—providing for the confidentiality of test results and medical information, with the exception of the use of test results for the orderly imposition of appropriate sanctions; and

—ensuring that employees are selected for random tests by nondiscriminatory and impartial methods.

These safeguards are critical to the success of any testing program. They are designed to ensure that an individual's basic rights to privacy are protected and that there is accountability and accuracy of testing. They provide what the Committee believes are the basic minimums. As a result, the Secretary is urged to review carefully the safeguards in any testing program to ensure that they are adhered to in a vigorous manner.

Accuracy is an essential aspect of any testing program. In this regard, the Committee has not specified the type of test to be utilized in either the screening or confirmatory test. However, it is the Committee's intention that any screening test that indicates the presence, without lawful authorization, of a controlled substance shall be confirmed by a scientifically recognized method specific to the compound detected, that no report of a positive screening test shall be made until such confirmation, and that any specimen testing negative on confirmation shall be reported as negative without disclosure of the results of the screening test. Evidential tests for alcohol shall be conducted by a method capable of estimating, with known reliability, the current blood alcohol concentration of the individual, and provide that an employee testing positive for alcohol using a specimen other than blood shall be entitled, at that employee's option, to a blood test by a method specific to ethyl alcohol. Conformation tests must be done using a testing procedure that has a proven record of accuracy. While this may be more costly, there is no substitute given the impact testing can have on an individual's career and life.

The safeguards to assure accurate laboratory testing under this subsection shall include State licensing, as well as the establishment by the Secretary of accreditation and proficiency standards. Because licensing standards vary from State to State, the Committee strongly believes that these safeguards must apply to assure the quality of laboratory testing procedures. In this regard, testing programs should, at a minimum, include specifications for minimum levels of experience and education needed by laboratory technicians, as well as the protocols to be followed in testing. In addition, the accuracy of laboratory testing programs must be periodically confirmed to assure the proficiency of each laboratory.

The safeguards included in the bill also seek to protect individual privacy in the collection of samples, consistent with procedures that may be necessary to ensure the integrity of samples. It is the Committee's intent to protect individual privacy by ensuring that specimens may be analyzed only for the purpose of detecting alcohol and controlled substances designated by the Secretary, except for samples needed for Federally-required physical examinations. These specimens may not be analyzed for any other purpose. The Committee is also seeking to provide for the confidentiality of test results to the extent consistent with the orderly imposition of appropriate sanctions. It is understood that, in the case of this limitation, the Secretary will have appropriate access for accident investigatory purposes, and that the pendency of judicial proceedings may necessitate some disclosure of test results. It is also the Committee's intent to provide for the confidentiality of non-drug and alcohol related medical information that may be provided by the employee or gained from the sample in connection with testing.

The safeguards also seek to ensure that employees are selected for random tests by nondiscriminatory and impartial methods. This is intended to ensure that no employee is harassed by being treated differently from other employees in similar circumstances. It has been suggested, for example, that a computer-generated random selection process might provide one possible method for minimizing the potential for harassment.

New subsection (1)(3) defines the term "controlled substance" as meaning any substance under section 102(6) of the Controlled Substances Act whose use the Secretary has determined poses a risk to transportation safety. In this regard, the Committee is aware that the Controlled Substances Act covers hundreds of drugs, thus making it practically and financially difficult to administer testing programs on a widespread basis. The intention of this provision is to ensure that those drugs with the widest potential for abuse be included in the testing programs established under this subsection, but not the myriad of drugs that are specified in the Controlled Substances Act.

SECTION 5—MOTOR CARRIERS

Section 5 of the bill would create a new section 12020 of the Commercial Motor Vehicle Safety Act of 1986. Subsection (a) of new section 12020 would require that within 12 months after enactment, the Secretary shall establish a program which requires motor carriers to conduct pre-employment, periodic recurring, random, and post-accident testing of the operators of commercial motor vehicles, and testing of operators upon reasonable suspicion that they have used, without lawful authorization, alcohol or a controlled substance. The bill limits testing to operators only. For purposes of this bill, a commercial motor vehicle is defined as it is in the Commercial Motor Vehicle Safety Act of 1986. As was contemplated under the provisions of that Act, this term could include trucks and buses operated by municipalities and States. With regard to controlled substances, the term "lawful authorization" implies drug use pursuant to a legitimate prescription issued by a medical doctor, within the prescribed level and which the Secretary considers permissible.

This subsection also specifies the conditions under which operators must be tested. Pre-employment testing is self-evident. With respect to periodic recurring testing, there are several situations which could occur, including testing at the time of a physical examination. Operators of commercial motor vehicles are required to undergo biennial physicals to retain their certification, and testing at such an occasion would be appropriate under this provision.

With respect to random testing, the Committee does not believe it would be appropriate to suggest a minimum number of employees that should be randomly tested at a certain frequency. Rather, the Committee believes that it is better to leave it to the Secretary to determine how specific programs should be administered. In determining how the programs are to be administered, the Secretary should take into account the cost of programs and their likely financial impact on carriers of different sizes. It is important, however, that each program provide adequate coverage to ensure effective deterrence of drug and alcohol abuse by motor carrier operators. Finally, as is noted in proposed subsection (d), in the section on testing safeguards, it is critical that whatever means is chosen to select randomly employees for testing, that selections must be done in an impartial and nondiscriminatory manner, so as to minimize the potential for harassment.

Testing will also be required when there is reasonable suspicion to believe that an individual is currenty under the influence of or impaired by alcohol or a controlled substance. Reasonable suspicion as envisoned by this bill does not require a showing of probable cause as that term is typically defined in a legal sense. Rather, the Committee anticipates that reasonable suspicion testing will be similar to that conducted under the current FRA rule which requires specific, personal observations concerning the appearance, behavior, speech or body odors of the employee.

New subsection (b)(1) provides that post-accident testing shall be required in the case of any accident in which occurs loss of human life, or, as determined by the Secretary, other serious accident involving bodily injury or significant property damage. It is not the Committee's intent that drug and alcohol testing should be required every time there is an accident involving a motor carrier. Rather, post-accident testing should be limited to those instances in which there is a loss of human life or other accident of sufficient magnitude in terms of bodily injury or significant property damage for which testing for drugs and alcohol would be warranted.

Subsection (b)(2) states that the Secretary is not precluded from providing that testing be conducted as part of the biennial medical examination required by the operators of commercial motor vehicles for Federal certification. Such testing would satisfy the requirement for periodic recurring testing under the bill.

New subsection (c) requires the Secretary to promulgate regulations setting forth requirements for a rehabilitation program for the identification and opportunity for treatment of operators of commercial motor vehicles who are determined to have used, without lawful authorization, alcohol or a controlled substance. The Secretary has the discretion to determine the circumstances under which operators shall be required to participate in such a program. Nothing shall preclude to participate in such a program. Nothing shall preclude a motor carrier from establishing a rehabilitation program in cooperation with another motor carrier.

Subsection (d) requires the Secretary to develop procedures designed to safeguard individual rights and testing procedures, including:

—promoting individual privacy in the collection of specimen samples;

—requiring procedures for a chain of custody in order to ensure proper identification and integrity of specimens;

—providing for confirmation of all positive tests by a second test of higher laboratory quality;

—requiring that laboratories involved in testing shall comply with all applicable requirements of a State license, shall meet such accreditation and proficiency standards as the Secretary may establish, and shall have the capacity and facility, at such laboratory, of performing screening and confirmation tests;

—providing for the confidentiality of test results and medical information, with the exception of the use of test results for the orderly imposition of appropriate sanctions; and

—ensuring that employees are selected for random tests by nondiscriminatory and impartial methods.

These safeguards are critical to the success of any testing program. They are designed to ensure that an individual's basic rights to privacy are protected and that there is accountability and accuracy of testing. They provide what the Committee believes are the basic minimums. As a result, the Secretary is urged to review carefully the safeguards in any testing program to ensure that they are adhered to in a vigorous manner.

Accuracy is an essential aspect of any testing program. In this regard, the Committee has not specified the type of test to be utilized in either the screening or comfirmatory test. However, it is the Committee's intention that any screening test that indicates the presence, without lawful authorization, of a controlled substance shall be confirmed by a scientifically recognized method specific to the compound detected, that no report of a positive screening test shall be made until such confirmation, and that any specimen testing negative on confirmation shall be reported as negative without disclosure of the results of the screening test. Evidential tests for alcohol shall be conducted by a method capable of estimating, with known reliability, the current blood alcohol concentration of the individual, and provide that an employee testing positive for alcohol using a specimen other than blood shall be entitled, at that employee's option, to a blood test by a method specific to ethyl alcohol. Confirmation tests must be done using a testing procedure that has a proven record of accuracy. While this may be more costly, there is no substitute given the impact testing can have on an individual's career and life.

The safeguards to assure accurate laboratory testing under this subsection shall include State licensing, as well as the establishment by the Secretary of accreditation and proficiency standards. Because licensing standards vary from State to State, the Committee strongly believes that these safeguards must apply to assure the quality of laboratory testing procedures. In this regard, testing programs should, at a minimum, include specification for minimum levels of experience and education needed by laboratory technicians, as well as the protocols to be followed in testing. In addition, the accuracy of laboratory testing programs must be periodically confirmed, to assure the proficiency of each laboratory.

The safeguards included in the bill also seek to protect individual privacy in the collection of samples, consistent with procedures that may be necessary to ensure the integrity of samples. It is the Committee's intent to protect individual privacy by ensuring that specimens may be analyzed only for the purpose of detecting alcohol and controlled substances designated by the Secretary, except for samples needed for Federally-required physical examinations. These specimens may not be analyzed for any other purpose. The Committee is also seeking to provide for the confidentiality of test results to the extent consistent with the orderly imposition of appropriate sanctions. It is understood that, in the case of this limitation, the Secretary will have appropriate access for accident investigatory purposes, and that the pendency of judicial proceedings may necessitate some disclosure of test results. It is also the Committee's intent to provide for the confidentiality of non-drug and alcohol related medical information that may be provided by the employee or gained from the sample in connection with testing.

The safeguards also seek to ensure that employees are selected for random tests by nondiscriminatory and impartial methods. This is intended to ensure that no employee is harassed by being treated differently from other employees in similar circumstances. It has been suggested, for example, that a computer-generated random selection process might provide one possible method for minimizing the potential for harassment.

Subsection (e) provides that no State or local government shall adopt any law, rule, regulation, ordinance, standard, or order that is inconsistent with the regulations promulgated under this section, with the exception of provisions of State criminal law which impose sanctions for reckless conduct leading to actual loss of life, injury or damage to property. Several States have enacted legislation, or are considering doing so, to prohibit or restrict drug and alcohol testing of certain classes of individuals. The Committee is concerned that these restrictions may impinge upon the ability of the Secretary to ensure effective implementation of this section, and therefore is acting to preempt those restrictions.

Subsection (f) provides that nothing in this section shall be construed to supersede any penalty applicable to the operator of a commercial motor vehicle under the Commercial Motor Vehicle Safety Act of 1986 or any other provision of law, and also provides that the Secretary shall determine appropriate sanctions for operators who are determined to have used, without lawful authorization, alcohol or a controlled substance, but are not under the influence of alcohol or a controlled substance, as provided in the Commercial Motor Vehicle Safety Act of 1986.

Subsection (g) defines the term "controlled substance" as meaning any substance under section 102(6) of the Controlled Substances Act whose use the Secretary has determined poses a risk to transportation safety. In this regard, the Committee is aware that the Controlled Substances Act covers hundreds of drugs, thus making it practically and financially difficult to administer testing programs on a widespread basis. The intention of this provision is to ensure that those drugs with the widest potential for abuse be included in the testing programs established under this section, but not the myriad of drugs that are specified in the Controlled Substances Act.

Section 5(b) of the bill makes changes to the table of contents of the Commercial Motor Vehicle Safety Act of 1986.

SECTION 6—PILOT TEST PROGRAM FOR COMMERCIAL MOTOR VEHICLE OPERATORS

Section 6(a) of the bill requires the Secretary to design, within nine months after enactment, and implement, within fifteen months after enactment, a pilot test program for the purpose of testing the operators of commercial motor vehicles by the States on a random basis to determine whether an operator has used, without lawful authorization, alcohol or a controlled substance. While it is envisioned that all operators of commercial motor vehicles would be subject to random testing in the States participating in this pilot program, it is the Committee's intent that this program will serve as a test, and establish a record on the effectiveness of State-administered testing in detecting individuals, such as independent owner-operators and independent drivers, who might otherwise avoid detection through the carrier-administered testing set forth in section 5 of this bill. With regard to controlled substances, the term "lawful authorization" implies drug use pursuant to a legitimate prescription issued by a medical doctor, within the prescribed level and which the Secretary considers permissible.

Subsection (b) requires the Secretary to solicit the participation of States interested in participating in such program, from which four States shall be selected for participation.

Subsection (c) requires the Secretary to ensure that the selection of participating States is representative of varying geographical and population characteristics and takes into consideration the historical geographical incidence of commercial motor vehicle accidents involving loss of human life. This should ensure a balanced pilot progam through a geographical mix of States within the Nation and which have a high incidence of deaths resulting from commercial motor vehicle accidents.

Subsection (d) provides that this pilot program shall continue for a period of one year and requires the Secretary to consider alternative methodologies for implementing a system of random testing of operators of commercial motor vehicles.

Subsection (e) specifies that not later than thirty months after enactment, the Secretary shall report to Congress the results of the pilot program, including any recommendations concerning the desirability and implementation of a system of random testing of operators of commercial motor vehicles. It is the Committee's intent that this report shall address both the results of the pilot program and include recommendations concerning random testing administered by means other than the carrier-administered random testing envisioned in section 5 of this bill. The Committee intends for this report to address specifically the feasibility and advisability of random testing by State enforcement agencies and address funding for such programs, including the use of the Motor Carrier Safety Assistance Program or other funds for this purpose. The Committee does not intend to preclude consideration in the report of Federal or local testing and other methods that could be effective in detecting operators who might otherwise avoid detection in the carrier-administered program established in section 5 of this bill.

Subsection (f) provides that for purposes of carrying out this pilot program, there shall be available to the Secretary up to $5,000,000 of funds from the Motor Carrier Safety Assistance Program for fiscal year 1988.

Subsection (g) defines "commercial motor vehicle" as that term is defined in the Commercial Motor Vehicle Safety Act of 1986. "Secretary" is also defined to mean the Secretary of Transportation. For the purposes of this new section, the Committee intends that the term "motor carrier" encompass persons who employ individuals who operate commercial motor vehicles in commerce, as that term is defined in section 12019(3) of the Commercial Motor Vehicle Safety Act of 1986.

ROLLCALL VOTES IN COMMITTEE

In accordance with paragraph 7(c) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following record votes during its consideration of the original bill:

On motion to report the original bill favorably:

YEAS	NAYS
Mr. Hollings	Mr. Pressler[1]
Mr. Inouye	
Mr. Ford	
Mr. Riegle	
Mr. Exon	
Mr. Gore	
Mr. Rockefeller	
Mr. Bentsen	
Mr. Kerry	
Mr. Breaux[1]	
Mr. Adams	
Mr. Danforth	
Mr. Packwood	
Mr. Kassebaum[1]	
Mr. Stevens[1]	
Mr. Kasten	
Mr. Trible	
Mr. Wilson[1]	
Mr. McCain	

[1] By proxy.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman):

THE FEDERAL AVIATION ACT OF 1958

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(b) Prohibition on service.
(c) Program for rehabilitation.
(d) Procedures.
(e) Effect on other regulations.
(f) Definition.

TITLE VII–TITLE XVI * * *

TITLE VI OF THAT ACT

TITLE VI—SAFETY REGULATION OF CIVIL AERONAUTICS

SEC. 601.–Sec. 612. * * *

ALCOHOL AND CONTROLLED SUBSTANCES TESTING

TESTING PROGRAM

SEC. 613. (a)(1) The Administrator shall, in the interest of aviation safety, prescribe regulations within twelve months after the date of enactment of this section. Such regulations shall establish a program which requires air carriers and foreign air carriers to conduct preemployment, periodic recurring, random and post-accident testing of airmen, crewmembers, airport security screening contract personnel, and other air carrier employees responsible for safety-sensitive functions (as determined by the Administrator), and testing of such individuals upon a reasonable suspicion that they have used, without lawful authorization, alcohol or a controlled substance.

(2) The Administrator shall establish a program applicable to employees of the Federal Aviation Administration whose duties include responsibility for safety-sensitive functions. Such program shall provide for pre-employment, periodic recurring, random and post-accident testing, and testing of such individuals upon a reasonable suspicion that they have used, without lawful authorization, alcohol or a controlled substance.

(3) In prescribing regulations under the programs required by this subsection, the Administrator shall require, as the Administrator considers appropriate, the suspension or revocation of any certificate issued to such an individual, or the disqualification or dismissal of any such individual, in accordance with the provisions of this section, in any instance where a test conducted and confirmed under this section indicates that such individual has used, without lawful authorization, alcohol or a controlled substance.

PROHIBITION ON SERVICE

(b)(1) No person may use, without lawful authorization, alcohol or a controlled substance after the date of enactment of this section and serve as an airman, crewmember, airport security screening contract personnel, air carrier employee responsible for safety-sensitive functions (as determined by the Administrator), or employee of the Federal Aviation Administration with responsibility for safety-sensitive functions.

(2) No individual who is determined to have used, without lawful authorization, alcohol or a controlled substance after the date of enactment of this section shall serve as an airman, crewmember, airport security screening contract personnel, air carrier employee re-

sponsible for safety-sensitive functions (as determined by the Administrator), or employee of the Federal Aviation Administration with responsibility for safety-sensitive functions unless such individual has completed a program of rehabilitation described in subsection (c) of this section.

(3) Any such individual determined by the Administrator to have used, without lawful authorization, alcohol or a controlled substance after the date of enactment of this section who (A) refuses to undertake, (B) fails to complete a rehabilitation program described in subsection (c) of this section, (C) has previously undertaken or completed such a rehabilitation program, or (D) has been determined by the Administrator to have served as an airmen, crewmember, airport security screening contract personnel, air carrier employee responsible for safety-sensitive functions (as determined by the Administrator), or employee of the Federal Aviation Administration with responsibility for safety-sensitive functions while impaired by or under the influence of alcohol or a controlled substance, shall not be permitted to perform the duties relating to air transportation which such individual performed prior to the date of such determination.

PROGRAM FOR REHABILITATION

(c)(1) Each air carrier and foreign air carrier shall establish and maintain a rehabilitation program which at a minimum provides for the identification and opportunity for treatment of employees referred to in subsection (b) of this section in need of assistance in resolving problems with the use, without lawful authorization, of alcohol or controlled substances. Each air carrier and foreign air carrier is encouraged to make such program available to all of its employees other than employees referred to in subsection (b) of this section. Nothing in this subsection shall preclude any air carrier or foreign air carrier from establishing a program under this subsection in cooperation with any other air carrier or foreign air carrier.

(2) The Administrator shall establish and maintain a rehabilitation program which at a minimum provides for the identification and opportunity for treatment of those employees of the Federal Aviation Administration whose duties include responsibility for safety-sensitive functions who are in need of assistance in resolving problems with the use of alcohol or controlled substances.

PROCEDURES

(d) In establishing the program required under subsection (a) of this section, the Administrator shall develop requirements which shall—

(1) promote, to the maximum extent practicable, individual privacy in the collection of specimen samples;

(2) require procedures for a chain of custody in order to ensure the proper identification and integrity of specimens;

(3) provide that all tests which indicate the use, without lawful authorization, of alcohol or a controlled substance by any individual shall be confirmed by a scientifically recognized method of testing capable of providing quantitative data regarding alcohol or a controlled substance;

(4) require that all laboratories involved in the testing of any individual under this section shall comply with the provisions of all applicable requirements of a State license, shall meet such accreditation and proficiency standards as the Administrator may establish, and shall have the capability and facility, at such laboratory, of performing screening and confirmation tests;

(5) provide for the confidentiality of test results and medical information (other than information relating to alcohol or a controlled substance) of employees, except that the provisions of this paragraph shall not preclude the use of test results for the orderly imposition of appropriate sanctions under this section; and

(6) ensure that employees are selected for tests by nondiscriminatory and impartial methods, so that no employee is harassed by being treated differently from other employees in similar circumstances.

EFFECT ON OTHER LAWS AND REGULATIONS

(e)(1) No State or local government shall adopt or put into effect any law, rule, regulation, ordinance, standard or order that is inconsistent with the regulations promulgated under this section, except that the regulations promulgated under this section shall not be construed to preempt provisions of State criminal law which impose sanctions for reckless conduct leading to actual loss of life, injury or damage to property, whether the provisions apply specifically to employees of an air carrier or foreign air carrier, or to the general public.

(2) Nothing in this section shall preclude the Administrator from adopting or continuing in effect other regulations intended to protect persons or property on the ground or in the air from the hazards to safety associated with the potential use of alcohol or controlled substances by airmen, crewmembers, airport security screening contract personnel, air carrier employees responsible for safety-sensitive functions (as determined by the Administrator), or employees of the Federal Aviation Administration with responsibility for safety-sensitive functions.

DEFINITION

(f) For the purpose of this section, the term "controlled substance" means any substance under section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)) whose use the Administrator has determined poses a risk to transportation safety.

THE FEDERAL RAILROAD SAFETY ACT OF 1970

Section 202 of that Act

SEC. 202. RAIL SAFETY REGULATIONS.

(a)–(k) * * *

(l)(1) The Secretary shall, within one year after the date of enactment of this subsection, review existing rules, regulations, standards, and orders governing alcohol and drug use in railroad operations for the purpose of determining whether they are adequate to

ensure safety. In conducting such review, the Secretary shall specifically—

(A) require that all railroad employees responsible for safety-sensitive functions (as determined by the Secretary) be subject to testing on a random basis for the use, without lawful authorization, of alcohol or a controlled substance;

(B) consider application of existing rules, regulations, orders, and standards to other categories of employees, including employees responsible for the safety of passengers, railroad rolling stock, or track and related structures;

(C) require, as the Secretary considers appropriate, disqualification for an established period of time or dismissal of any employee determined to have used or to have been impaired by alcohol while on duty; and

(D) require, as the Secretary considers appropriate, disqualification for an established period of time or dismissal of any employee determined to have used a controlled substance, whether on duty or not on duty, except as permitted for medical purposes by law and any rules, regulations, standards or orders issued under this Act.

Nothing in this subsection shall be construed to restrict the discretion of the Secretary to continue in force, amend, or further supplement any rules, regulations, standards and orders governing alcohol and drug use in railroad operations issued before the date of enactment of this subsection.

(2) In carrying out the provisions of this subsection, the Secretary shall develop requirements which shall—

(A) promote, to the maximum extent practicable, individual privacy in the collection of specimen samples;

(B) require procedures for a chain of custody in order to ensure the proper identification and integrity of specimens;

(C) provide that all tests which indicate the use, without lawful authorization, of alcohol or a controlled substance by any employee shall be confirmed by a scientifically recognized method of testing capable of providing quantitative data regarding alcohol or a controlled substance;

(D) require that all laboratories involved in the testing of any employee under this section shall comply with the provisions of all applicable requirements of a State license, shall meet such accreditation and proficiency standards as the Secretary may establish (which, when established, shall preempt any requirements of a State that are inconsistent with the testing conducted pursuant to this subsection), and shall have the capability and facility, at such laboratory, of performing screening and confirmation tests;

(E) provide for the confidentiality of test results and medical information (other than information relating to alcohol or a controlled substance) of employees, except that the provisions of this subparagraph shall not preclude the use of test results for the orderly imposition of approriate sanctions under this section; and

(F) ensure that employees are selected for tests by nondiscriminatory and impartial methods, so that no employee is harassed

by being treated differently from other employees in similar circumstances.

(3) For the purposes of this subsection, the term "controlled substance" means any substance under section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)) whose use the Secretary has determined poses a risk to transportation safety.

THE COMMERCIAL MOTOR VEHICLE SAFETY ACT OF 1986

Section 12001 of that Act

SECTION 12001. SHORT TITLE AND TABLE OF CONTENTS.

(a) * * *

(b)TABLE OF CONTENTS.—

Sec. 12001.-Sec. 12019.* * *

Sec. 12020. Alcohol and controlled substances testing.

Section 12019 of that Act

SEC. 12019.* * *

SEC. 12020. ALCOHOL AND CONTROLLED SUBSTANCES TESTING.

(a) REGULATIONS.—The Secretary shall, in the interest of commercial motor vehicle safety, prescribe regulations whithin twelve months after the date of enactment of this section. Such regulations shall establish a program which requires motor carriers to conduct pre-employment, periodic recurring, random and post-accident testing of the operators of commercial motor vehicles, and testing upon a reasonable suspicion that they have used, without lawful authorization, alcohol or a controlled substance.

(b) TESTING.—(1) In promulgating such regulations, the Secretary shall require that post-accident testing of the operator of a commercial motor vehicle be conducted in the case of any accident involving a commercial motor vehicle in which occurs loss of human life, or, as determined by the Secretary, other serious accidents involving bodily injury or significant property damage.

(2) Nothing in subsection (a) of this section shall preclude the Secretary from providing in such regulations that such testing be conducted as part of the medical examination required by subpart E of part 391 of title 49, Code of Federal Regulations, with respect to those operators of commercial motor vehicles to whom such part is applicable.

(c) PROGRAM FOR REHABILITATION.—The Secretary shall promulgate regulations setting forth requirements for a rehabilitation program for the identification and opportunity for treatment of operators of commercial motor vehicles who are determined to have used, without lawful authorization, alcohol or a controlled substance. The Secretary shall determine the circumstances under which such operators shall be required to participate in such program. Nothing in this subsection shall preclude a motor carrier from establishing a program under this subsection in cooperation with any other motor carrier.

(d) PROCEDURES FOR TESTING.—In establishing the program required under subsection (a) of this section, the Secretary shall develop requirements which shall—

(1) promote, to the maximum extent practicable, individual privacy in the collection of specimen samples;

(2) require procedures for a chain of custody in order to ensure the proper identification and integrity of specimens;

(3) provide that all tests which indicate the use, without lawful authorization, of alcohol or a controlled substance by any individual shall be confirmed by a scientifically recognized method of testing capable of providing quantitative date regarding alcohol or a controlled substance;

(4) require that all laboratories involved in the testing of any individual under this section shall comply with the provisions of all applicable requirements of a State license, shall meet such accreditation and proficiency standards as the Secretary may establish, and shall have the capability and facility, at such laboratory, of performing screening and confirmation tests;

(5) provide for the confidentiality of test results and medical information (other than information relating to alcohol or a controlled substance) of employees, except that the provisions of this paragraph shall not preclude the use of test results for the orderly imposition of appropriate sanctions under this section; and

(6) ensure that employees are selected for tests by nondiscriminatory and impartial methods, so that no employee is harassed by being treated differently from other employees in similar circumstances.

(e) EFFECT ON OTHER LAWS AND REGULATIONS.—No State or local government shall adopt or put into effect any law, rule, regulation, ordinance, standard or order that is inconsistent with the regulations promulgated under this section, except that the regulations promulgated under this section shall not be construed to preempt provisions of State criminal law which impose sanctions for reckless conduct leading to actual loss of life, injury or damage to property, whether the provisions apply specifically to commercial motor vehicle employees, or to the general public.

(f) APPLICATION OF PENALTIES.—Nothing in this section shall be construed to supersede any penalty applicable to the operator of a commercial motor vehicle under this Act or any other provision of law.

(2) The Secretary shall determine appropriate sanctions for commercial motor vehicle operators who are determined, as a result of tests conducted and confirmed under this section, to have used, without lawful authorization, alcohol or a controlled substance but are not under the influence of alcohol or a controlled substance, as provided in this title.

(g) DEFINITION.—For the purposes of this section, the term "controlled substance" means any substance under section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)) whose use the Secretary has determined poses a risk to transportation safety.

ADDITIONAL VIEWS OF MR. INOUYE

RELATING TO THE TRANSPORTATION EMPLOYEES SAFETY AND REHABILITATION ACT OF 1987

I have grave reservations regarding the Transportation Employee Safety and Rehabilitation Act of 1987. Although I voted in favor of reporting this bill, my action should not be construed as support for this proposed legislation. Rather, my vote was cast for the sole purpose of promoting the expedient consideration thereof. Accordingly, in light of the pressing concerns elaborated upon below, I reserve the right to submit amendments to this bill.

There are several problems with this bill as it now stands. They include: (1) potential unconstitutionality of random testing of all employees covered therein, or as it affects numerous classes of employees whose connection to public safety is attenuated; (2) silence with regard to the funding of this massive undertaking and the ramifications thereof; and (3) silence with regard to a remedy for an aggrieved employee whose privacy guarantees are violated.

UNCONSTITUTIONALITY OF RANDOM TESTING

This bill mandates drug testing for pre-employment screening, post-accident investigations, and when based on reasonable suspicion. Testing under these circumstances would survive constitutional scrutiny. However, random testing without reasonable suspicion has been found unconstitutional as a fourth amendment violation of an employee's right to privacy.

In determining whether a search and seizure is reasonable, courts have balanced the government's interest in searching against an individual's right to privacy. *New Jersey* v. *T.L.O.*, 469 U.S. 325 (1985). In ascertaining the weight of an individual's privacy interest, courts have unanimously found that the seizing of blood constitutes a grave invasion of privacy within the meaning of the fourth amendment. *Schmerber* v. *California*, 384 U.S. 757, 767 (1966); *McDonell* v. *Hunter*, No. 85-1919, slip op. at 8 (8th Cir. Jan. 12, 1987) (available on LEXIS). Further, the degree of intrusion involved in the seizing of urine has been held akin to the taking of blood. "Though urine, unlike blood, is routinely discharged from the body so that no actual [physical] invasion is required for its collection, [both can be] analyzed in a medical laboratory to discover numerous physiological facts about the person from whom it came." *Capua* v. *City of Plainfield*, No. 86-2992, slip op. at 7-8 (D.N.J. Sept. 18, 1986). Moreover, it is the act of discharging this fluid upon which the reasonable expectation of privacy attaches. Consequently, in light of an individual's reasonable expectation of privacy in these fluids, the employer must have a compelling interest to test before it will be held constitutional. Proponents of this

Bill contend that the government has a compelling interest to protect public safety. This is a well intended and strong government interest. However, in light of recent court decisions, it is highly questionable whether it is sufficient to outweigh the employee's right to privacy.

Various federal courts have been asked to determine whether random testing of firefighters, U.S. customs inspectors, and civilian police officers was constitutional. Although the direct impact of the responsibilities of these employees on public safety was not questioned, courts, nonetheless, held that the employees' constitutional right to privacy outweighed the government's interest in drug testing without reasonable suspicion. *See Capua* v. *City of Plainfield*, 55 U.S.L.W. 2170 (D.N.J. 1986) (testing of fire fighters without reasonable suspicion unconstitutional); *Lovvorn* v. *City of Chattanooga*, 55 U.S.L.W. 2170 (E.D. Tenn. 1986) (same holding); *American Federation of Government Employees* v. *Weinberger*, 1 IER Cases 1137 (S.D. Ga. 1986) (Department of Navy civilian police officers' remote relation to national security or public safety insufficient to find testing constitutional); *National Treasury Employees Union* v. *von Raab*, 55 U.S.L.W. 2284 (E.D. La. 1986) (drug testing of U.S. customs inspectors unconstitutional without reasonable suspicion). It may be argued that the public safety interest implicit in the responsibilities of air pilots and rail conductors is more substantial than that of fire fighters, U.S. customs inspectors, or civilian police officers. However, it cannot be disputed that the interests are clearly similar. Consequently, if challenged, a court may also find this proposed drug testing of transportation employees unconstitutional. This position is further supported by case law involving police officers and bus drivers wherein drug testing was allowed solely because of the existence of reasonable suspicion. *Turner* v. *Fraternal Order of Police*, 500 A.2d 1005 (D.C. 185) (drug testing of police officers permitted where individualized suspicion of drug use found); *Amalgamated Transit Union* v. *Suscy*, 538 F. 2d 1264 (7th Cir.). *cert. denied*, 429 U.S. 1029 (1976) (drug testing of city bus drivers permitted where reasonable suspicion of drug use found).

Moreover, the more attenuated an employee's responsibilities are to impacting public safety, the greater the possibility that this legislation would be found unconstitutional as applied thereto. For example, the bill proposes that drug testing be administered to aviation crew members, airport security screening contract personnel and similar positions in the rail and commercial motor vehicle industries. These positions seem quite similar to that of a bus attendant who the D.C. District Court held could not be tested without reasonable suspicion in light of her diminished connection with public safety. *Jones* v. *McKenzie*, 628 F. Supp. 1500 (D.D.C. 1986). Hence, there is a very strong probability that the testing of these classes of air, rail, and motor vehicle employees would also be found inconstitutional. Based on this strong probability, if the Bill were to pass in the same haste that it was written, countless litigation would surely result therefrom. The cost of court battles run high—not only in terms of the financial calculations, but also in the number of lives disrupted and number of careers destroyed—as various classes of employees test the constitutionality of this legislation.

Proponents of the Bill rely on a few court cases and the Coast Guard's drug testing program to support their position. However, their reliance is misplaced. First, the military coast guard, unlike the private sector transportation employees, have a diminished expectation of privacy upon entering the U.S. military service. The D.C. Circuit stated, in *Committee for G.I. Rights* v. *Calloway,* 518 F.2d 466 (D.C. Cir. 1975), that soldiers are subjected to inspections from the first day of boot camp thereby decreasing their reasonable expectation of privacy. Consequently, it is quite tenuous to rely on *Calloway* or the Coast Guard program as the basis to justify random testing of private sector transportation employees, whose constitutional right to privacy is not diminished.

Second, supporters of random drug testing attempt to squeeze into the narrow administrative search exception set up to monitor closely regulated industries. While the court, in *Shoemaker* v. *Handel,* 795 F.2d 1136 (3d Cir. 1986), allowed the random testing of racing jockeys it did so on the narrow grounds that the employees in the gambling industry, a closely regulated industry, were deemed to have consented to random testing upon entering the industry. In addition to gambling, the only other private industries which fall within this limited administrative search exception are the liquor and gun industries. Although many have tried to broaden this narrow exception, it has remained limited to these three industries. Hence, since the transportation industry is not within this exception, reliance on *Shoemaker* is misplaced.

Third, proponents of this Bill cite to *McDonnell* v. *Hunter,* No. 85–1919, slip op. (8th Cir. Jan. 12, 1987) (available on LEXIS), wherein the court held that uniform random testing of prison guards who are in contact with prisoners on a day-to-day basis in medium or maximum security prisons was justified in light of the documented prevalence of drug use and trafficking in prison systems. On its face, it may seem that *McDonnell* supports the Bill's proposed random drug testing. However, a careful analysis reveals that the situations are, in fact, dissimilar. There is no documented evidence that air pilots, flight attendants, rail operators, rail or air security screening contract personnel or any other class of employees covered under this Bill are heavy drug users or are involved in drug trafficking. Further, Unlike *McDonnell,* wherein the court allowed uniform random drug testing for a very narrowly defined group of prison guards, proponents of this Bill have broadly classified the group of employees to be tested, regardless of the degreee of the group's impact on public safety. Lastly, proponents allege that the drug use statistics relating to truck drivers suffice as a basis for testing transportation employees. The fact that transportation operators carry passengers form, to a large degree, the public safety argument for requiring such testing. Since truck drivers do not carry any passengers, the weight of this statistical evidence is diluted. Consequently, full reliance in *McDonnel* is also misplaced.

I cannot agree with the rationale that only those employees that are drug users would fear or find such testing repulsive. Instead, it is the interests of all employees, the straight and the drug users, that must be balanced. I do not believe that the government's interest in random testing is compelling enough to justify invading the privacy rights of all employees without reasonable suspicion. Based on the recent court decisions which have required reasonable suspicion prior to drug testing to protect the employees' constitutional right to privacy, it is highly questionable whether the proposed Bill will withstand constitutional scrutiny.

FUNDING IT RELATES TO INACCURATE TEST RESULTS

There is no provision in the Bill which addresses the question of funding. This silence may create numerous problems. For example, gas chromatography-mass spectrometry, the most accurate testing device, costs between $50–$100 per test. The second most accurate drug test, immunoassay, costs $5 per test. This large gap in cost is also evident in the degree of accuracy of these tests. In light of the substantial cost associated with the gas chromatography method, the $5 test is most often opted for. United Press International reported on August 26, 1984 that the military has administered approximately six million drug tests in the past two years which resulted in "tens of thousands of false positives which . . . have 'wrecked' many military careers" (available on NEXIS). Even with the increasing technological advances aimed at curing laboratory inaccuracies, "false-positive reports of drugs like morphine, codeine, cannabinoids, phencyclidine, benzoylecgonine, secobarbital, and amphetamines continue to appear in distressingly large numbers." 256 Journal of the American Medical Association 3003 (Dec. 5, 1986). Consequently, the degree of inaccuracy associated with the $5 test could needlessly jeopardize the careers of many transportation employees.

REMEDY FOR AGGRIEVED EMPLOYEES

Also silent in the proposed legislation is a provision informing the employee of his/her right to relief if the privacy guarantees are violated. One particular area of concern is an employer's use of the additional medical information contained in one's blood or urine. These fluids reveal the existence of a history of venereal disease, epilepsy, and susceptibility to heart disease and strokes which may be used against an employee. Note, *Drug Testing in the Workplace*, 13 J. Legis. 269 (1986). While a provision exists to protect an employee's privacy regarding medical history, if no remedy is made available for the violation thereof, it is an empty protection. Additionally, this legislation does not set forth the procedures that an employee may follow if he/she desires to challenge the positive test result. It fails to even direct the Secretary to so promulgate.

DANIEL K. INOUYE.

ADDITIONAL VIEWS OF MR. KERRY

I voted affirmatively to report the drug testing bill because I strongly support the move to reduce the risk to public safety associated with the use of illegal drugs and alcohol by transportation workers on the job. Nevetheless, I have grave reservations about several specific provisions of this legislation. I believe that the full Senate needs to carefully consider the exact provisions we want in such a bill in light of all of the evidence—much of which is still emerging—about this important subject and to ensure that any legislation represents the appropriate balance of public safety and individual rights. We must do this to insure that any legislation represents an effective, Constitutional, and fair means of achieving the goal which I—and indeed all of us in Congress—support: a workplace and a society in which the hazards created by employees working under the influence of alochol, narcotics, and controlled substances will be eliminated.

Sometimes as legislators we are forced to choose between loyalty to the Constitution—to ideals such as privacy and civil rights that we hold dear—and the desire to accomplish important public policy objectives. On the surface it would appear that this is the choice that we face now—the desire to eradicate the unlawful and dangerous abuse of alcohol and drugs, and the need to respect the appropriate Constitutional limits on the government's police powers and to insure that individuals have the benefit of due process under the law.

I would argue that these appearances are deceiving, and that upon closer inspection it becomes clear that we do not have to sacrifice one goal to accomplish the other: we can develop the kind of effective, mandatory drug screening programs that public safety requires and respect the appropriate limits as set down by the Constitution and interpreted by the Courts. I would go even further, and assert that if we want to develop an effective drug screening program that can be implemented quickly, without costly and protracted legal battles and with broad public support, we must carefully craft any legislation to ensure that it will be upheld by the Courts and supported by the American people.

In testimony before the Commerce Committee earlier this year, National Traffic Safety Board Chairman James Burnett made this very point when he said that it would be a mistake to embark on a program of random mass testing which inevitably means that "a lot of people will be injured, creating a backlash against the whole concept of drug testing."

Although random drug testing has only recently come into full public view, we are seeing a growing number of incidents which suggest what may lie ahead when we embark on indiscriminate testing on a massive scale.

Item: Weeks after it was reported that laboratory tests showed evidence of marijuana byproducts in the blood of Conrail employees involved in the fatal January 4 collision with an Amtrack train, the Transportation Department acknowledges that the test results may be "procedurally flawed" even though they were conducted at the premier medical laboratory run by the FAA.

Item: A Washington D.C. television reporter has recently documented a 70 percent error rate on a group a specimens sent blindly to six D.C. area commercial laboratories.

Item: Following the NCAA basketball Final Four, press reports term the drug testing procedures "Kafkaesque." Sports Illustrated reports that "Countless players were detained for hours after games, while they tried to overcome dehydration and produce specimens. Others, in legitimate need of medication, feared taking it, lest they test positive for a banned substance. Florida Coach Norm Sloan went so far as to move his Gators from their Syracuse hotel, fearing his players might test positive because of passive marijuana smoke from another room."

Item: A civilian employee of the Army's Aberdeen Proving Grounds tests positive for drug use and is dismissed. But confirmatory tests at a local hospital show that no drug byproducts were present in her body at the time.

These incidents should surprise no one, as numerous cases in both state and federal courts have shown, the issues of privacy, accuracy, and due process raised by drug testing are exceedingly complex and controversial. I support the general notion of "mandatory drug screening programs" for selected categories of employees and I believe that there is overwhelming public support for such a program. The challenge is how we translate this broadly supported goal into legislation which is fair, effective, and capable of withstanding the inevitable legal challenges we can expect.

I do believe that this legislation makes an important statement on a critical problem and the Committee and its Chairman deserves great credit for the priority given to this problem. However, I believe that recent examples of concerns raised by current drug testing activities suggest ways in which the Commerce Committee proposal can be made even better with greater likelihood of an effective, fair, and prompt program.

My primary concern is with the legal and Constitutional implications of arbitrary random drug testing in the transportation industry. No drug testing program will be effective in combating drug abuse unless it is on sound legal ground, and can withstand a Constitutional challenge. If we pass a drug testing bill, and that bill is not upheld by the courts, then we have achieved nothing in the fight against drugs. For this reason, I believe that we must carefully analyze the cases which have examined drug testing programs, and craft our bill carefully in response to that analysis.

Some have argued that compulsory drug tests violate the 14th amendment prohibition against unreasonable searches and seizures. It has also been argued that drug tests violate the 5th amendment right against self-incrimination, and 14th amendment guarantees of due process. It has also been argued that drug tests violate the right to privacy, which is not mentioned explicitly in the Constitution but has been defined by the Supreme Court to some extent. Some state constitutions and statutes also protect the right to privacy. Legal protections may also differ for public employees vs. private employees, and for unionized employees vs. nonunionized employees.

Even if the Courts were to uphold the mass random testing program required by this legislation, I would have serious reservations about various issues which I believe are not adequately addressed by the current bill. These include the costs of the drug screening and confirmation testing, the cost, management and evaluation of employee rehabilitation programs, and the rights of employees to appeal a positive finding of drug use.

I believe that the first improvement in the Commerce Committee's proposal would be to move away from the requirement for random testing of all employees, regardless of whether or not they have displayed any record of impaired performance, judgement, or other work or personality disorders which may indicate a substance abuse problem.

Personally, I feel that testing is likely to be found unconstitutional in all but the most unusual circumstances. I realize that there are other Senators who do not share this view. But regardless of one's view of the constitutionality issue, I believe it is obvious that the existence of such ambiguity will lead to protracted an expensive legal challenges—and not just once, but potentially dozens of times, as everyone from airline pilots to baggage handlers and flight attendants seek to have the law struck down as it applies to them. The clear direction of the federal courts at this point is to rely heavily when resolving such Constitutional questions on job-related factors, such as "reasonable expectations of privacy" and "heavily regulated industry" distinctions. Such considerations will lead to numerous lawsuits, and the consequent delays will not only be very expensive, but they will also delay the very goal we seek to achieve: the attainment of a drug-free workplace, safe for workers, coworkers, and the general public.

There is another option. By striking the requirement for random testing we would still have an extremely tough program of mandatory testing in pre-employment, post-accident, probable cause circumstances, as well as during part of regular physical examinations on the part of all personnel. The same sanctions and rehabilitation requirements could still be applied to those discovered to have a substance abuse problem.

Such an approach would represent a significant new extension of federal regulation and would significantly reduce substance abuse and increase the safety of the traveling public. Moreover, such an approach would have the support of both labor and management, and could be implemented immediately without the delays and expense of long court battles.

By choosing a mandatory drug screening program that focuses attention on new employees, and those with behavioral or performance-related problems we can target the resources and expertise where there is likely to be a problem without needlessly imposing a toll on the privacy and dignity of others who have demonstrated a steady command of their work. In addition, all employees would also be subjected to drug testing as part of a regular physical exam. However, this testing is done in the context of the Doctor-patient relationship and insures privacy and dignity, while the laboratory procedures used will insure maximum test accuracy.

I propose that we go forward with such a program and see how it works. After a couple of years of experience we will have a record and we can then compare, reassess, and determine whether we need to go even further. I don't believe we will, but if it does happen we will at least have established a record of due deliberation, and we will have data and a basis for supporting a claim of compelling public interest. I believe that only such a process will meet the Constitutional tests that will surely be required for such an unprecedented action as massive, arbitrary drug testing.

There are other areas where the Commerce Committee bill can also be improved. For example, the bill makes no provision for employees who wish to appeal the findings of a drug test. In the last few weeks the evidence supporting the need for an appeals process has grown significantly. The provisions of the bill which address the certification of laboratories and testing personnel also need strengthening in my opinion.

Extreme caution in the areas of employee appeals, lab certification, and other questions about the accuracy of the test results is necessary because of the extreme uncertainty surrounding this new technology, and the profound impact a positive finding can have on thousands of individual lives and careers.

I am also concerned that while the bill states that any employee found to have tested positive must complete a rehabilitation program, the bill does not state who will pay for the program, or whether the employee must be paid—or will even continue to receive health insurance benefits—during this period. These issues are fundamental to any assessment of the relative costs and benefits of the legislation, and its impact on our society. It is important that the Senate address these vital issues as our deliberations on the issues move forward.

While proposals to extend drug-testing may have popular appeal, I am concerned that any such program, if implemented, would face severe legal challenge and might very well be struck down by the courts. In addition, there is a very real problem that the test results would not be completely accurate, thus stigmatizing innocent people as drug users, and possibly costing them their jobs.

JOHN F. KERRY.

ADDITIONAL VIEWS OF MR. ADAMS

I adhere to the additional views expressed by Senator Inouye and Senator Kerry in this Committee Report regarding the Transportation Employee Safety Act of 1987. Although I too voted to report the bill to the full Senate my aim in doing so was to spur the debates on, among other issues, the bill's disturbing mandate that broad-based random testing be implemented throughout the transportation industry.

I am deeply committed to the goal of making United States highway, rail and air travel the safest in the western world. To this end I have introduced, along with Senator Danforth, S. 943, the Truck and Bus Safety Act of 1987, and I have also consistently opposed legislation to increase speed limits to 65 mph. As a former Secretary of Transportation I am keenly aware of the special trust placed in our transportation carriers and operators and of the horrible consequences when that trust is broken.

Drug and alcohol abuse by American rail engineers, bus drivers and pilots is a breach of that trust and should not be tolerated. I support reasonable and effective means to identify and prevent such abuse. But random testing, as would be required by the Transportation Safety and Rehabilitation Act of 1987 is simply not reasonable.

I have several concerns about this legislation, the most fundamental of which is my concern, cogently articulated by Senator Inouye and Senator Kerry in their additional views included in this Report, that the Act is patently unconstitutional and that to make it law, knowing it is constitutionally flawed, would be grossly irresponsible. Years might pass while constitutional challenges moved through the courts to final resolution by the U.S. Supreme Court. In the meantime, the constitutionally protected rights of privacy, of freedom from unreasonable search and seizure and against self-incrimination, of millions of Americans will have been violated. In the meantime, thousands of careers and lives will have been damaged or destroyed.

My other great concern with this legislation is that it fails to provide virtually any guidance to the Secretary of Transportation in her promulgation of rules to implement this massive testing program. The potential for abuses and unfairness arising in a federally mandated program under which upwards of 3,000,000 transportation workers may be randomly tested on regular basis dictates that Congress itself must tell this Secretary what it wants the testing program to look like. I know well from my own tenure as a Secretary of Transportation that to be asked to promulgate a rule in a legislative vacuum is nothing more than a recipe for disaster.

Questions begged by this legislation include:

What will the testing programs cost and who will foot the bill, both directly and indirectly? The most accurate tests cost $100 to $175 each.

How much testing inaccuracy is intolerable? One relatively reliable urinalysis test, the EMIT test, has a 95 percent accuracy rate, producing 50,000 false results for every million tests.

How will test laboratories be certified and what agency will certify them? Is DOT qualified to administer this critical function? During the Commerce Committee hearings on this bill Senators repeatedly cited the discovery of drugs in the urine of the Conrail engineer driving the train which collided with the Amtrak train in January in Chase, Maryland as the catalyst for this legislation. And yet we now know, the Secretary of Transportation herself has told us, that the positive drug test results may have been flawed by "procedural irregularities" in the administration of the tests by the DOT's lab.

How will employers handle worker grievances related to drug testing? Will they even be required to handle grievances?

What minimum standards for rehabilitation programs will be imposed? Does Congress contemplate full scale residential rehab programs or two weeks of out-patient counseling? And again, how much will rehabilitation cost and who pays?

This list just touches on a few of the dozens of critically important issues on which this legislation is silent. This silence represents an abrogation of legislative responsibility. In its haste to turn its twin concern about drug abuse and transportation safety into law the Senate Commerce Committee has skipped a few steps. For not only is the bill silent on these issues, but the legislative record developed by the Committee is silent as well.

BROCK ADAMS.

MINORITY VIEWS OF MR. PRESSLER

With great reservations, I voted against the Transportation Employee Safety and Rehabilitation Act of 1987 because of concern over its application to small businesses. It is my hope that this concern can be alleviated before the bill is considered by the full Senate.

I would like to support this bill. My present concern stems from potential problems in its application. As I have stated previously in Committee hearings, I fully support its aim and purpose. My vote was based on practical implementation problems rather than philosophical opposition to drug testing or alleged Constitutional defects.

As originally drafted, this legislation was to be limited to the airline and railroad industry. Subsequently, it was applied to the truck and bus industry. I do not dispute the advisability of this extended application, but I do believe that it raises additional considerations that merit special attention.

Specifically, my concern is that this expanded application of drug testing may unnecessarily disadvantage smaller businesses, which are especially prevalent in the truck and bus industries, vis a vis their larger counterparts. This is not to say that small businesses should be exempt from drug testing. My only point is that we should consider and address their special needs in the application of this bill.

For example, while it is appropriate and efficient to require United Airlines to establish, finance, and conduct an on site testing program at its employee facilities, the same may not be true for a small trucking operation with a handful of employees in Ludlow, South Dakota. My concern is that it will not be feasible for small, remote transportation operations hundreds of miles from certified testing personnel and facilities to comply with the requirements of this bill. Also, the testing costs associated with this legislation may be significantly higher for small businesses than will be the case for larger operators. I use the example of potential problems for small trucking operations because the large number of small trucking companies provides the clearest illustration of the practical problems with the bill. But the same concern applies to small businesses in other modes of transportation.

Finally, I am concerned about the broad scope of the authority granted to the Department of Transportation in dealing with these and other matters, and the lack of more specific Congressional guidance for the exercise of that jurisdiction. If this legislation is enacted, I hope the Department of Transportation will be sensitive to the practical problems confronted by small and remote businesses in order to avoid future problems.

While I do not believe small businesses should be exempted from this legislation, they should be given special consideration in order to ensure that the inconveniences and costs associated with compliance are no greater for small businesses than will be the case with the larger corporations which will be able to comply with relative ease.

While I share the concerns expressed by many of my colleagues regarding the Constitutional questions raised by the bill, and while I am concerned about possible abuses in its application, I believe a workable program can be developed which adequately addresses those issues. The bill and accompanying legislative history provide clearly articulated Congressional guidance in these areas of concern, and there will be ample opportunity to ensure Department of Transportation compliance with these guidelines through court review. Unfortunately, the same is not true with respect to the issues I have raised.

LARRY PRESSLER.

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